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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,

vs.

DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court class action judgment wholly or predominately for money damages may bar the individual claims of absent class members who had minimum contacts with the forum state but who were not provided with an opportunity to "opt out" of the class as required by due process.

PARTIES

A list of all petitioners and respondents is contained in Appendix A.

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No.

IN THE

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vs.

DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

John H. Martin, et al., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 24a) is not yet reported. The opinion of the Circuit Court of Jefferson County (App., *infra*, 49a) is unreported.

JURISDICTION

The Supreme Court of Alabama entered its judgment on July 7, 1995. (App., *infra*, 48a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The question presented arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides that "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

This action arose out of an allegedly fraudulent tender offer made by Drummond Company, Inc. and Drummond Coal Sales, Inc. ("Drummond" or the "Drummonds") for shares of stock of Alabama By-Products Corporation ("ABC"). The Drummonds contended, and the trial court and the Supreme Court of Alabama held, that plaintiffs' claims were barred by a prior class action judgment in Delaware, *Hynson v. Drummond*, CV No. 7904 (Del. Ch. 1990). John H. Martin and the other petitioners asserted that pursuant to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the *Hynson* class action judgment, which was wholly for money damages, did not bar their claims as absent class members because they had not been afforded their procedural due process right to opt out of the class.

A. The Tender Offer

In December 1984, the Drummonds made a tender offer of $75.00 per share to acquire all outstanding shares of ABC stock. Pursuant to the tender offer, Drummond acquired ownership of approximately 91% of the ABC shares. Drummond then effected a squeeze-out merger of all the remaining ABC shares. (App., *infra*, 28a). A number of ABC shareholders who did not tender all of their shares dissented from the merger and sought appraisal of their shares in a statutory appraisal proceeding in Delaware. *Neal v. Alabama By-Products Corp.*, CV No. 8282 (Del. Ch. 1985). In that proceeding the fair value of the ABC stock was determined to be $180.67 per share. (App., *infra*, 30a). See *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

B. The *Hynson* Class Action

In January 1985, before the tender offer was concluded, a class action was brought in Delaware against the Drummonds and several of the directors of Drummond and ABC,[1] claiming fraud and breach of fiduciary duty in connection with the tender offer. *Hynson v. Drummond Company, Inc., et al*, CV No. 7904 (Del. Ch. 1990). The class was described as those stockholders who had tendered their ABC shares. In the summer of 1989, Drummond and class counsel for Hynson reached a settlement in principle. Later that year, a Notice of Settlement was mailed to the tendering ABC shareholders. The Notice informed class members that a fairness hearing would be held in the Delaware Chancery Court on February 1, 1990, that the proposed settlement required Drummond to pay $5,000,000 in cash to the plaintiffs (and their attorneys), and that no other relief, legal or equitable, was granted against Drummond. The Notice also provided that class members had the right to appear in Delaware, either in person or through an attorney, to object, and that absent class members who did not appear and object would be barred from later objecting to the settlement. The Notice did not provide the absent class members with an opportunity to opt out of or request exclusion from the class. (App., *infra*, 29a).

On February 1, 1990, Drummond and class counsel for Hynson presented the trial judge with an agreed-upon order certifying the *Hynson* class under Delaware Rules 23(b)(1) and (2). The trial court signed the proposed order on that same day without providing the absent class members with the right to opt out.

Because the Delaware court had merely signed an agreed-upon order regarding the non-opt-out class certification and had

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[1] Each of the defendants in the instant case was named as a defendant in *Hynson*.

not specifically addressed the question of whether that certification was appropriate, the Drummonds went back to the Delaware court, after Martin filed this action, to urge that court to address the question expressly. Rather than appearing in Delaware in opposition and submitting themselves to the jurisdiction of the Delaware court, the plaintiffs elected to pursue their remedies in the Alabama court. The Delaware court made a specific finding that the petitioners had not made an appearance in Delaware. The Delaware court determined that the case had been properly certified previously and that a right to opt out of the litigation was not constitutionally required. *Hynson v. Drummond Coal Co.*, 601 A.2d 579 (Del. Ch. 1991).

C. Course of Proceedings Below

This suit was commenced in January of 1991 by John H. Martin against the Drummonds and several present and former directors of the Drummond companies and ABC. The other plaintiffs subsequently joined Mr. Martin. All of the complaints asserted essentially the same claims, including claims for fraud, coercion and breach of fiduciary duty arising out of the tender offer and the acts or omissions of the officers and directors of Drummond and ABC in connection with the tender offer. The complaints also sought a declaration that the settlement and judgment in *Hynson* did not preclude plaintiffs from bringing their claims for money damages because plaintiffs, who were absent class members, were not given the right to opt out of the class and to bind plaintiffs without giving them that right would violate due process.

The defendants filed a motion for summary judgment on res judicata grounds, and the trial court granted that motion. The plaintiffs appealed to the Supreme Court of Alabama, which affirmed the trial court.

The Alabama Supreme Court concluded that an absent class plaintiff's minimum contacts with the forum can serve as a

constitutionally sufficient substitute for the opt-out right mandated in *Shutts*. The court found that the plaintiffs had minimum contacts with the State of Delaware and that the right to opt out prescribed by *Shutts* therefore was inapplicable. The Alabama court further relied on the fact that the Delaware Supreme Court, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), had held that its courts had the discretion to provide class members with the opportunity to opt out of a (b)(2) class. Here, the plaintiffs had failed to appear in Delaware to request this discretionary right to opt out of the class. Therefore, the court held that, because plaintiffs did not expressly request such an opt-out right, the procedures provided could not be deemed unfair.

The Alabama Supreme Court frankly conceded its confusion over the holding in *Shutts*, stating:

> We are not sure how far *Shutts* and *Shaffer* [*v. Heitner*, 433 U.S. 186 (1977),] reach in this situation; indeed, the United States Supreme Court, as we read *Ticor [Title Insurance Co. v. Brown*, 511 U.S. ___, 114 S. Ct. ___, 128 L.Ed.2d 33 (1994)], seems unsure of the reach of *Shutts*. Clearly, *Shutts* requires, in a class action for monetary damages, opt-out rights for class members who do not have sufficient contacts with the class action forum. . . .

(App., *infra*, 44a-45a) (footnote omitted). The court went on to hold that the plaintiffs had sufficient contacts and that *Shutts*, therefore, did not require a right to opt out of the class.

REASONS FOR GRANTING THE PETITION

The Alabama Supreme Court expressly acknowledged its confusion about the reach of this Court's opinion in *Shutts*. (App., *infra*, 44a-45a). Numerous other federal and state courts have grappled with the issue of whether absent class plaintiffs having minimum contacts with the forum can be bound, consistent with due process, if an express opt-out right is not provided. Several cases in both the federal and state courts have concluded that *Shutts* is a minimum contacts case, while one federal court of appeals has concluded that *Shutts* is a procedural due process case. Moreover, as the court below recognized, this Court's opinion in *Ticor Title Insurance Co. v. Brown*, 511 U.S. ___, 114 S. Ct. 1359, 128 L.Ed.2d 33 (1994), has added to this confusion. (App., *infra*, 44a-45a). The need for guidance from this Court is critical. This case is a timely opportunity to provide that guidance. The decision below is erroneous, and the issue that it addresses is important.

I. The Supreme Court of Alabama's Interpretation of this Court's Opinion in *Phillips Petroleum Co. v. Shutts* Conflicts with the Ninth Circuit's Interpretation and Aggravates the Existing Split of Authority in the Circuit and State Courts.

In *Shutts*, this Court held that in order to bar absent class plaintiffs from later bringing claims wholly or predominately for money damages, the absent class plaintiffs must be afforded certain *procedural* due process rights. These include, at a minimum, providing an absent plaintiff with an opportunity to remove himself from the class by merely executing and returning an opt out or request for exclusion form to the court. 472 U.S. at 812.

The Alabama Supreme Court limited the *Shutts* holding to cases in which the plaintiffs do not have minimum contacts with the class action forum. (App., *infra*, 32a). The Alabama court's

holding conflicts with the decision of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386, 392 (CA9 1992), *cert. granted*, 114 S. Ct. 56 (1993), *cert. dismissed per curiam*, 114 S. Ct. 1359 (1994). In *Ticor*, the Ninth Circuit held that an absent class plaintiff's claim for money damages was not barred by res judicata because that plaintiff had been denied his procedural due process right to opt out of the prior class action.

Circuits other than the Ninth, on the other hand, have misread *Shutts*, finding it to be inapplicable in cases wherein the absent class plaintiffs had minimum contacts with the forum state. For example, in *White v. National Football League*, 41 F.3d 402, 407-08 (CA8 1994), *cert. denied*, 115 S. Ct. 2569 (1995), the Eighth Circuit construed *Shutts* as holding that in class actions due process requires an opt-out right only as to plaintiffs who are beyond the personal jurisdiction of the forum court.[2] In *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (CA3), *cert. denied*, 115 S. Ct. 480 (1994), the Third Circuit held that notice, plus an opportunity to be heard and participate in the litigation, "are sufficient to bind absent class members who had sufficient minimum contacts with the forum".[3] In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (CA2 1992), the Second Circuit opined that "because there is no question that the court has jurisdiction over appellants, *Shutts* is inapposite. Thus, the district court did not abuse its discretion in denying appellants the opportunity to opt out of the class." The highest court of the State of New York also has limited the right to opt

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[2] As the district court found in *White*, that case involved primarily equitable relief. *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993); *White v. National Football League*, 836 F. Supp. 1458, 1472 (D. Minn. 1993). Moreover, the plaintiffs had voluntarily litigated the merits of the settlement. *White*, 41 F.3d at 408.

[3] See also *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (CA3 1993); *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (CA3), *cert. denied*, 493 U.S. 821 (1989).

out to those absent plaintiffs lacking minimum contacts with the forum. *In the Matter of Colt Industries Shareholder Litigation*, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991). In addition, commentators disagree with regard to the proper interpretation of *Shutts*. Some read *Shutts* as rejecting a minimum contacts test,[4] while others view *Shutts* as requiring an opt-out right only in cases where absent class members do not have minimum contacts with the forum state.[5]

Shutts unambiguously holds that absent class action plaintiffs with predominately monetary claims have a procedural due process right to opt out of the class. *Shutts* did not limit that right to absent plaintiffs lacking minimum contacts with the forum. Nonetheless, the Alabama Supreme Court, while expressly acknowledging uncertainty regarding the holding of *Shutts*, substituted a minimum contacts analysis for the procedural due process test of *Shutts*. Moreover, as noted, there is a conflict between the circuits, and this conflict extends to the decisions of the highest courts of at least two states. There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court.

II. This Case Does Not Present the Circumstances that Caused this Court to Dismiss the Petition for Certiorari in *Ticor Title Insurance Company v. Brown*.

This Court granted a petition for certiorari raising a similar question in *Ticor Title Insurance Company v. Brown*, 114 S. Ct.

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[4] See Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871, 885 (1995); 1 H. Newberg and A. Conte, *Newberg on Class Actions*, § 1.16 (3d ed. 1992); Note, *Phillips Petroleum Company v. Shutts, Procedural Due Process, and Absent Class Plaintiffs: Minimum Contacts is Out — Is Individual Notice In?* 13 Hastings Const. L.Q. 817, 833 (1986).

[5] See A. Miller & D. Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum v. Shutts*, 96 Yale L.J. 1, 52 (1986).

56 (1993), but subsequently dismissed the petition as improvidently granted. 114 S. Ct. 1359 (1994)(per curiam). The concerns that motivated that dismissal are not present in this case.

The Court in *Ticor* confronted the question of whether a *federal* court could refuse to enforce a *federal* class action judgment involving money damages, when the class had been certified, pursuant to Rules 23(b)(1) and 23(b)(2) of the *Federal* Rules of Civil Procedure, without affording the absent class members the right to opt out. 114 S. Ct. at 1361. Over the dissent of Justice O'Connor, joined by the Chief Justice and Justice Kennedy, the Court dismissed the petition because it did not wish to reach the constitutional issue when the possibility existed that the class could have been certified properly only under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which Rule provides a right to opt out. 114 S. Ct. at 1361-62.[6] The law of res judicata prevented the Court from reexamining the class certification of the prior class action. 114 S. Ct. at 1361.

In contrast, the issue in this case cannot be resolved on nonconstitutional grounds because the *Hynson* judgment involved a class certified by a Delaware state court pursuant to the Delaware Rules of Civil Procedure. This Court has no authority to decide nonconstitutional questions concerning the application of those Delaware rules. The Delaware court initially certified the *Hynson* class under Delaware rules which do not require opt-out rights for absent class members. After petitioners filed this case, the Drummonds sought and obtained a hearing before the same Delaware court which had issued the *Hynson* judgment, and the Delaware court specifically reaffirmed that the class had been properly certified under the Delaware rules and that no opt-out right was required to bind absent class plaintiffs to the money

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[6] In addition, the parties in *Ticor* had reached a settlement designed to moot the petition. 114 S.Ct. at 1362.

judgment. *Hynson v. Drummond Coal Co.*, 601 A.2d 579 (Del. Ch. 1991). Accordingly, unlike a case involving the federal rules, over which this Court has final interpretive authority, the application of the Delaware rules under these circumstances has been conclusively determined by the Delaware court. This case therefore requires the Court to deal exclusively with the constitutional issue presented.

III. The Decision of the Supreme Court of Alabama Conflicts with this Court's Holding in *Phillips Petroleum Co. v. Shutts*.

The Court held in *Shutts* that "[i]f the forum state wishes to bind an absent plaintiff concerning a claim for money damages . . . it must provide minimum *procedural* due process protection." 472 U.S. at 811-12 (emphasis added). The Court defined such procedural due process protection to include the following:

> In addition, we *hold* that due process requires *at a minimum* that an absent class plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Shutts, 472 U.S. at 812 (emphasis added).[7]

This Court's language in *Shutts* is remarkably clear. The minimum procedural due process protection necessary to bind an absent class plaintiff includes the right to opt out, a right that was indisputably not provided here.

The Alabama Supreme Court misread *Shutts* to require an analysis of the plaintiffs' contacts with Delaware. *Shutts* re-

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[7] The holding in *Shutts* was limited to claims wholly or predominately for money judgments. The judgment in this case was wholly monetary; it provided for the payment of $5,000,000 in cash. No other relief, legal or equitable, was granted.

quires no such analysis. The Court in *Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members. The distinction made by the Court was between absent *plaintiffs* and absent *defendants*. Some of the class members in *Shutts* undeniably had minimum contacts with the class action forum; some in fact were residents of that forum. The Court made no distinction between the procedural due process rights of those with and those without minimum contacts.

The Court's extensive discussion of personal jurisdiction in *Shutts* was necessitated by the peculiar context in which the constitutional question arose. The defendant, Phillips Petroleum, argued that absent class plaintiffs without minimum contacts could not be bound unless they affirmatively "opted in" to the class. The Court rejected this personal jurisdiction argument as to absent class plaintiffs, holding that because they had fewer burdens than defendants, they could indeed be bound, even absent the minimum contacts that would be required to bind a defendant. The Court held, however, that absent class plaintiffs could only be so bound if they were given procedural due process protections, including the right to opt out. 472 U.S. at 812.

Moreover, a chose in action is a property interest protected by the Constitution. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950). As a matter of fundamental fairness, it is no more appropriate to allow an unknown class representative to control the property interest of a resident absent class plaintiff, than it is to allow him to control the property interest of a plaintiff who has no contacts with the forum. A resident absent class plaintiff has just as much interest in hiring his own lawyer, making the decision to sue or not to sue, determining whether or not to accept a proposed settlement, and exercising his right to a jury trial, as does one with no contacts with the forum.

This Court should grant the petition to resolve the conflict among the lower courts and to correct the error of the Alabama Supreme Court.

IV. The Question Presented is Important.

Shutts was a landmark case regarding the procedural due process protection that must be afforded all absent class plaintiffs. The Court's holding in *Shutts* was unambiguous. However, subsequent cases, including the instant case, have refused to provide that procedural due process protection where the absent class plaintiffs had minimum contacts with the forum. The Alabama Supreme Court, obviously uneasy over the result in this case, has urged this Court to provide guidance in determining the "reach of *Shutts*." Unless this Court provides that guidance, the lower courts will continue to struggle with the holding in *Shutts*.

The decision below also has broad fairness implications. Without further direction from this Court, the constitutional right of an absent class member to opt out of a class will depend entirely on the forum selected by the class representative. If the class action is filed in the Ninth Circuit, a constitutional right to opt out will be afforded absent class members with predominately money claims, including those with minimum contacts with the forum. No such constitutional right will be provided by courts in the States of Alabama and New York, nor by courts in the Second, Third and Eighth Circuits, if the absent class members have minimum contacts. The constitutional rights of absent class members should not be subject to the whim of the named plaintiff in choosing a forum. Either the Constitution affords a right to opt out, or it does not.

Finally, review of the decision below is important because resolution of this issue is critical to the administration of the class action process. If the Court permits the minimum contacts analysis employed by the Alabama court and others to stand, the

implications are enormous. At the commencement of any class action, discovery on an individual basis would be necessary to determine which of potentially hundreds or thousands of absent class members have minimum contacts with the forum. Moreover, a minimum contacts test will inevitably lead to uncertainty in class settlements, as there can be no finality so long as there exists some absent class plaintiff without such contacts. That plaintiff would not be bound and could collaterally attack the class judgment. In light of this potential for endless litigation, the provision of certainty and finality is clearly of no less consequence to defendants than to plaintiffs.[8]

This Court should grant certiorari to review the decision of the court below (i) to decide the important constitutional question presented, (ii) to eliminate the conflict in constitutional interpretation which exists between the lower courts, (iii) to correct the error of the Alabama Supreme Court, and (iv) to provide guidance in the administration of class actions.

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[8] As the Court explained in *Shutts*, the defendant bears some responsibility for safeguarding the interests of the absent class plaintiffs. 472 U.S. at 810. Here, had Drummond desired to achieve the maximum preclusive effect, it could have agreed to provide the absent plaintiffs with an opt-out right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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*Counsel of Record

CERTIFICATE OF SERVICE

I, James L. North, a member of the Bar of this Court, hereby certify that on this 2nd day of October, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

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APPENDIX D

September 2, 1993 Order of Judge Parker in Civil Action No. CV-91-0143, Circuit Court of Jefferson County, Alabama, styled *Martin, et al., v. Drummond, et al.* 49a

APPENDIX A

MARTIN PETITIONERS

John H. Martin
Mary Anne Adams, custodian for Katherine Grace Adams
Mary Anne Adams, custodian for Mary Britt Adams
Katherine Grace Adams
Mary Anne Adams, custodian for Charles T. Adams
Mary Anne Adams, custodian for Richard Adams, Jr.
Mary Britt Adams
Richard M. Adams, Jr.
Charles T. Adams
Edmond R. Agee
Judith Lee Aland
Leonore Aland
Herman G. Alexander and Elaine Alexander, as joint tenants
Pearl Godfrey Alexander and J. Terry Noland, Co-Executors of the Estate of George B. Alexander, Deceased
ALFA, a corporation
Martha S. Allgood
Charles D. Allgood, II
Charles L. Allgood
Leigh Hill Allison
Thomas T. Allison, Jr.
Helen McWane Allison
AmSouth Bank, N.A. and Marvin Cherner, Co-Executors of the Estate of Kaciel Cherner, Deceased
AmSouth Bank as trustee for The Greater Birmingham Foundation W. Felix Harris, Jr. Designated Fund
Ernest E. Armstrong
Charlotte Callis Atwood
Auction Insurance Agency Profit Sharing Trust
Nancy B. Averett

Helen C. Badt
Kathryn W. Baernstein
Elisabeth Bailliere
Anne Bailliere
Alexandra R. Bailliere
Mary Stuart Ramsay Baldwin
William H. Barnes
William H. Barnes, Jr.
Evelyn Morrow Barry
John R. Bates
Alice B. Bates
Jack Becker
Clemmie Weaver Bell
Maud G. C. Belser, custodian for Warren Belser III, UGMAAL
Elaine Bercu
Harold B. Blach, Jr.
Black Diamond Coal Mining Liquidating Trust
Ethelyn H. Bond
Richard A. Bowron and Ruth M. Bowron, as Joint Tenants
Richard A. Bowron
James Edgar Bowron, Jr.
James E. Breland and Annie W. Breland, JTTEN
Lela Anne Brewer
Marion C. Breyer
Caroline Marbury Bright
Harbert L. Brown and Lillian F. Brown, Joint Tenants
Harbert L. Brown
Mr. and Mrs. Hugh W. Buck, as joint tenants
The Bulls & Bears Investment Club, a Partnership
Evelyn S. Burger
Olive R. Burt
Jean K. Bynum
Joanne H. Callis, as Trustee for Stanlee H. Callis

Joanne H. Callis
William H. Cammack
Car & Company, as Trustee under the will of Charles Henderson
Winston Carl
Charles D. Carlisle
Kenneth M. Carnathan
Kirke White Cater
The Cathedral Church of the Advent Endowment Fund
Centennial Casualty Co.
Chapin Davis Pension Trust Fund
Bedford Chapin
Chapin Davis & Co.
Chapin Davis Profit Sharing Plan
Lois Chapman
George K. Chapman
Howard B. Cheek
J. Ted Cheek & Ellen H. Cheek, Joint Tenants
Marvin Cherner, as Executor under the will of Fannie Furst
Marvin Cherner, as Trustee under the will of Rachel Cherner
Marvin Cherner
Leona R. Cherner
Marvin Cherner, on behalf of K. Cherner Company
Mortimer A. Cohen
Thomas Coleman
George Coleman
Donald J. Collins
Dorothy C. Collins
Robert C. Collins
Edward C. Collins
Bester Wynne Colman, III, Executor of the Estate of Robert H. Cochrane III, Deceased, as Trustees under Hendrix, Mohr & Yardley, Inc. Revised Employee Profit Sharing Plan & Trust Agreement dated September 29, 1977

Jerome A. Cooper
Estate of Robert G. Cosper
Mary Lowe Cosper
John B. Cox, Jr.
Betty Crawford
Edith Johnston Crook
Dr. Charles B. Crow
Catherine C. Crow
Warren Baker Crow, IV, executor of the estate of Pauline M. Crow, Deceased
George E. Dailey, Jr.
The Danley Corporation, a corporation
Francis Evans Davies
Miriam Rew Davies
Alexander V. Davies
H. Melville Davis, Jr. and John B. Davis, Personal Representatives of the Estate of Louise B. Davis, Deceased
John B. Davis
Sara Druhan Davis
William E. Davis
Georgia D. Davis
H. Chace Davis, Jr.
Lee Ola Dewberry
Alice B. Diamond
Donald Berry Dumas
Lawrence Dumas, III
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for W.B. Dumas
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for A.D. Schanbacher

Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for J.H. Dumas II

L.G. Duncan

Jessellan Leach Dunn

James M. Dunn, Jr.

Lucie D. Greene Ellard

John D. Elmore

Equitable Securities Corporation, a corporation

Beverly B. Erdreich

Stanley Marx Erdreich, III

Mary Elizabeth Erdreich

Richard M. Evans

Mrs. James V. Fairley

Roberta J. Farr and Patricia J. Jenkins, Personal Representatives for the Estate of Richard Rider Jackson, Sr., as qualified on June 21, 1991

Jim Filler

First Alabama Bank, as Trustee under the will of Josephine B. Cohen

First Alabama Bank as trustee of Florence E. Simpson Trust

First Alabama Bank as trustee of Ellen A. Bush Testamentary Trust

First Alabama Bank as trustee of Ann Paget Trust for Frances Pizitz

First Alabama Bank as trustee of Marcia B. Stearns Trust No. 3 for Thomas Stearns

First Alabama Bank as trustee of George W. Stubbs, Jr. Marital Trust

First Alabama Bank, Personal Representative of George Stubbs Trust for E. Agee

First Alabama Bank as trustee of Marcia B. Stearns Trust II for Thomas Stearns

First Alabama Bank as Trustee under the will of Edmund C. Leach

First Alabama Bank as trustee of Marcia B. Stearns Trust for Gloria Stearns-Bruner

First Alabama Bank as trustee of Marcia B. Stearns Trust for Thomas Stearns

First Alabama Bank as trustee of Ellen A. Bush Trust

First Alabama Bank as trustee of Marcia B. Stearns Trust for Ethelyn Stearns

First Alabama Bank as trustee of J.T. Flagg Marital Trust-Testamentary

Effie Davis Flanagan

Alice Oden Ford

Allie N. Fort

Minnie Bell Jeffers Fowlkes, Personal Representative of the Estate of Henry Fowlkes, Jr., Deceased

B. Bell Jeffers Fowlkes

Corinne L. Fox

Borden Hughson Burr, II, and Robert S. Weatherly, Jr., Personal Representatives of the Estate of Anne F. Givhan, Deceased

Dale S. Gold

Thomas Douglas Bagley and Barbara Dawn Bagley, beneficiaries of the Paul D. Bagley Trust

Constance M. Gray

Jane J. Hagan

Florence V. Haigler

Fletcher L. Harris

Ann E. Hartsfield

Eleanor S. Hassinger

J.R. Hawkins

Jane Hill Head

Beverly P. Head, III

Edna S. Hebard and Donna J. Richardson Jarvis, Joint Tenants

John Joseph Heck

Lois Anne Ramsay Heck
Dorothy D. Hickman
J. David Higgins, Jr.
John D. Higgins, III
Robert Bond Higgins
D.R. Hillenbrand
Marion J. Hobart
C.B. Holliman
Dorothy Wood Hume
Fay L.J. Hynson Marital, Mercantile Safe Deposit & Trust Co., Co-Trustee with Richard Hynson, Sr. and Richard Hynson, Jr., under the will of Fay L.J. Hynson
Thomas A. Immler
Independent Presbyterian Church
Carson G. Inscho, Jr.
Hugh W. Jackson
Hugh W. Jackson, as Trustee for Hugh W. Jackson U/A/D 9/13/84
Richard R. Jackson, Jr., Roberta Jackson Farra, guardians for Richard R. Jackson, Sr.
Kate J. Jackson
Jackson Holding Company
Everett E. Jackson, IV
Richard R. Jackson, Jr.
Jane Craft Jackson
Elizabeth L. Porter James
Patricia Jackson Jenkins
Cornelia Murfree Johnson
Frank M. Johnston
Olmer C. Jones, as Executrix of the Estate of Fletcher E. Jones
Leo M. Karpeles, Jr.
Ruth L. Karpeles, as custodian for Leo M. Karpeles III and Margaret F. Karpeles

Leo M. Karpeles, Jr., as executor of the estate of Frances F. McEachern
Fred W. Kemp, Executor of the Estate of Sammie L. Kemp
Eleanor E. Kidd
Jane B. Knox
John L. Kontos
Leon A. Kontos
Bobbie R. Kontos
Leon A. Kontos, Jr.
Robert J. Kyle, Jr.
Lakeshore Hospital
Sally R. Lamar
Harald F. Lassen
William W. Lawrence, as administrator of the estate of Julia L. Kershaw
Alonzo H. Lee, Jr.
Alonzo H. Lee, Jr., as Executor of the Estate of Alonzo H. Lee
Mrs. Louise Aland Levin
Sadie C. Levy
Betty W. Loeb
Henry Sprott Long
Henry and Margaret P. Long, Trustees of Ruth Lacy Long Trust
George E. Lourie
Fariss Gambrill Lynn
Henry Sharpe Lynn, Jr.
Margaret C. Manis
Sarah Lawford Marbury
Harry Markstein, as executor of estate of Hazel R. Goldman
Roy C. Martin and Elizabeth R. Martin, Joint Tenants
Estate of Harold B. Mayes
Jill D. McArthur
Emily McCall
Willard McCall, Jr., as custodian for Willard McCall, III

Willard McCall
Robert L. McCalley
Estate of Dorothy Wood McCormack
Elonia P. McHenry
William K. McHenry, Jr.
Elizabeth Pitts McVay
Mercantile Safe Deposit & Trust Co., as Trustee under Trust Nos. 2338-0 and 23337
Mercantile Safe Deposit & Trust Company as custodian for Frances L. Nash
Mercantile Safe Deposit & Trust Company, Co-Trustee with Sheila McCreery Jackson, under the will of Richard N. Jackson, Jr.
Mercantile Safe Deposit & Trust Company and Catharine J. Dallich, Trustees under the will of Catharine B. Jackson
Mary Crawford Meriwether
Metalplate Company, Inc., a corporation
Harold F. Miller, Jr.
Alice M. Miller
Ethelyn H. Miller
Mining Ore and Equipment Co., Inc. Profit Sharing Trust
Mining Ore & Equipment Co., Inc. and its affiliates Profit Sharing Trust FBO M. Lee Mitchell and M. Lee Mitchell
Lucy M. Mitchell
M. Lee Mitchell Insurance, Inc. Profit Sharing Trust Segregated
Melinda Mitchell, Custodian for Christine Crouse and J. Cooper Crouse
Ms. Willard M. Mobley
Walter J. Morgan, Jr. and Helen D. Morgan, Joint Tenants
Delano Morris
Mary J. Brewer Murkett
Phillip T. Murkett, Jr.
James G. Nash

Linda Jane Nelson, as administrator of the estate of Harold B. Mayes
Alex W. Newton
North Carolina National Bank as Trustee of Rosanna Craft Trust
Charles S. Northen, III
William F. Owens
Dale Parker
William Phillips, Executor of the Estate of Bert Saeger
Ruth Carpenter Pitts
Charles C. Pitts
William H. Pitts
Pocahontas Land Company
Warren G. Porter
Charles K. Porter
Charles K. Porter IRA
Clyde H. Porter, Jr., Personal Representative of the Estate of Sadie Gay Porter, Deceased
Charles Edward Porter
Janice N. Porter, Trustee for John F. Porter Testamentary Trust
Maude Kendall Ryding Powell
Lydia K. Quick
Amory Edward Quinn, Jr.
Evelyn S. Ramsay
Robert Erskine Ramsay and Irene B. Ramsay, Joint Tenants
Robert McLester Ramsay
Realty Rental Company, a corporation
Fred W. Renneker, III
Joan Rittenbaum
Cornelia Wendel Johnson Rodde
Dorah Sterne Rosen, by Lawrence Rosen, attorney-in-fact
Alan Hayden Rosen
J. Neil Rosen
Dorah Lee Rosen

Mary Jeffray Ryding
Louis Sacks
Margaret P. Saeger
Louis Schulhafer, III, as executor of the Estate of Louis Schulhafer, Jr.
Walter E. Shackelford
Samuel M. Shay
Elizabeth A. Shay
Elisabeth D. Sherwood and Anne Bailliere, as Co-executors of the Estate of Elisabeth Dobbin
Elisabeth D. Sherwood
Anne Sherwood
Elisabeth D. Sherwood, custodian for Robert J. Kyle, Jr.
Elisabeth D. Sherwood, custodian for Anne D. Sherwood
Lottchen V. Shivers
Lee M. Shook, Executor of the Estate of Virginia Shook Blue
T. Julian Skinner, Jr.
Farley B. Snow
Estate of Madeline Solomon, Dale S. Gold, Executrix
Robert E. Spruiell
Margaret R. Starr
Marcia B. Stearns
Lawrence Rosen, Personal Representative of the Estate of Dorah H. Sterne, Deceased
Sterne Agee & Leach, Inc. Employees Profit Sharing Plan
Hubert M. Stiles
Lilian C. Stiles
Margaret B. Stroud
Suburban Properties, Inc.
Mary Hiden Crowder
Marion K. Tortorici, custodian for Natalie A. and Samuel M. Tortorici

Tutwiler Investment Co., a corporation
Pauline Tutwiler
Temple W. Tutwiler, III, as trustee of T.W. Tutwiler II Inter-Vivos Trust
Allen J. Tutwiler
Union Bank & Trust Company, Executor of the Estate of Etna McGaugh Atkinson, Deceased
Universal Securities Corporation Defined Benefits Pension Plan
Universal Securities Corp., a corporation
Lois H. Vick
Nancy Smith Walker
Thomas E. Walker, Jr.
John Neal Walker
Lucy G. Walker
Eugene Walters
Ruby G. Warren
William Ramsey Watkins
Mary H. Watson
Melba K. Watters, Executrix, Estate of Reynolds W. Watters
Nolan John Wehby
Frank S. White, III
Virginia McGahey White
Murray C. White
Annelise W. Wiesel
Maurine H. Monsky Wiener
Anne Maring Wiley
Delmar H. Williamson
James M. Wilson
Nancy Knight Wilson
Thomas F. Wimberly, Executor of the Estate of Margaret F. Wimberly
Ethel Snyder Brown Wingo
Betty Bashinsky Wise

Wittichen Supply Co., a corporation
W.H. Woolverton, Jr., Executor of the Estate of Susan Orr Woolverton, Deceased
Sylvia D. Worrell
Mary Belle N. Yardley
Thomas K. Yardley
Charles G. Yeager
Elizabeth A. Yeilding
Juliett M. Zarzaur

AMSOUTH PETITIONERS

AmSouth Bank, as Trustee of the Robert Meyer Foundation
AmSouth Bank, as Trustee of the Robert R. Meyer Memorial Scholarship Fund
AmSouth Bank, as Trustee under Agreement Executed November 9, 1973, by the Board of Directors of the Alabama Boys Industrial School
AmSouth Bank, as Agent for the Family and Child Services Agency
AmSouth Bank, N.A., and Lawrence Dumas, III, Co-Executors of the Estate of Lawrence Dumas, Jr., deceased
AmSouth Bank, as Trustee of the Katherine H. Dorsey Revocable Trust
AmSouth Bank, as Trustee of the Reid Thompson Revocable Trust
AmSouth Bank, as Trustee of the Vernon Van Aken Trust Under Agreement
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Margaret Gaines
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Allen A. Johnson, Jr.
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of C.L. Gaines, III

AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Hansell Burke

AmSouth Bank, as Trustee of the Charitable Trust Under the Will of Pearl E. Ray

AmSouth Bank, as Trustee of the Kirby W. Sevier Testamentary Family Trust

AmSouth Bank, as Trustee of the Madeleine McCormack Testamentary Trust

AmSouth Bank, as Trustee of the P.G. Robinson Family Trust for the Benefit of M. Turner

AmSouth Bank, as Trustee of the Cornelia Robinson Testamentary Trust

AmSouth Bank, as Trustee of the Lilla Sevier Huffman Irrevocable Trust

AmSouth Bank, as Trustee Under the Will of Carr McCormack for the Benefit of Carr McCormack, Jr.

AmSouth Bank, as Trustee Under the Will of Carr McCormack for the Benefit of George E. McCormack

AmSouth Bank, as Trustee Under the Pension Trust Agreement Executed By AmSouth Bancorporation on December 13, 1973

AmSouth Bank, as Trustee of the Margaret R. Monaghan Testamentary Trust

AmSouth Bank, as Trustee of J. Frank Rushton Family Trust

AmSouth Bank, as Agent for Henry S. Lynn

AmSouth Bank, as Custodian for Rucker Agee

AmSouth Bank, as Trustee of the M. McWane Item 9 Trust for the Benefit of H.M. Allison

AmSouth Bank, as Trustee of the M. McWane Item 10 Trust for the Benefit of E.M. Fairley

AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of J.M.G. Parker, Jr.

AmSouth Bank, as Trustee of the Cabaniss, Johnston and Gardner Self Employed Money Purchase Pension Trust Agreement

AmSouth Bank, as Executor of the Grosvenor C. Dyar Estate
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of Katherine Hamm
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of Ben Moore, III
AmSouth Bank, as Trustee of the Robert R. Meyer Testamentary Trust C
AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of J.C. Harrison
AmSouth Bank, as Trustee of the Marital Trust Under the Will of J.R. McDavid
AmSouth Bank, as Trustee of the Trust Under the Will of J.R. McDavid for the Benefit of Carolyn M. Ray
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of James and F.M. Parker
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Allan H. Rosen
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Jacob N. Rosen
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Dorah L. Rosen
AmSouth Bank, as Agent for the Natalie G. Sperling Investment Agency
AmSouth Bank, as Trustee of the Marital Trust Under the Will of Edgar Allan Rowe, Sr.
AmSouth Bank, as Trustee of the Family Trust Under the Will of Edgar Allan Rowe, Sr.
AmSouth Bank, as Trustee of the Frederick G. Koenig, Jr., Marital Trust
AmSouth Bank, as Trustee of the Frederick G. Koenig, Jr., Family Trust
AmSouth Bank, as Trustee of the Germer Petesch Trust Under Agreement

AmSouth Bank, as Trustee of the C. Shook Testamentary Trust for the Benefit of Allen A. Johnson, Jr.

AmSouth Bank, as Trustee of the C. Shook Testamentary Trust for the Benefit of Margaret Gaines

AmSouth Bank, as Custodian for Dorah H. Sterne

AmSouth Bank, as Investment Advisor for Mrs. Roy Hickman

AmSouth Bank, as Agent for Susan Shook

AmSouth Bank, as Custodian for Dr. Louise Branscomb

AmSouth Bank, as Trustee of the M.S. McWane Trust Under Agreement for the Benefit of E.M. Fairley

AmSouth Bank, as Trustee of the M.S. McWane Trust Under Agreement for the Benefit of H.M. Allison

AmSouth Bank, as Trustee of the H.M. Allison Trust for the Benefit of Thomas M. Allison

AmSouth Bank, as Trustee of the Isabel Anderson Comer Trust Under Agreement

AmSouth Bank, as Trustee of the Robbie O. Sevier Trust Under Agreement

AmSouth Bank, as Trustee of the Teresa Shook Testamentary Trust

AmSouth Bank, as Trustee of the Trust Under the Will of Evelyn F. Jones

AmSouth Bank, as Trustee of the Family Trust Under the Will of David D. Wendel

AmSouth Bank, as Agent for Bess Bailey Coe, Trustee of the Family Trust Under the Will of John V. Coe, Jr.

AmSouth Bank, as Custodian for the Executor of the Mary Mellen Estate

AmSouth Bank, as Successor Trustee Under the Will of James D. Hammett by Court Order Dated November 27, 1961 for the Benefit of Lula H. Morris

AmSouth Bank, as Trustee of the Bess Bailey Coe Revocable Trust

AmSouth Bank, as Trustee of the Bernice P. Carlson Revocable Trust

AmSouth Bank, as Trustee of the Dave Sokol Trust Under Agreement

AmSouth Bank, as Trustee of the Loris C. Rich Revocable Trust

AmSouth Bank, as Trustee of the S. Gregg Meyer Trust Under Agreement

AmSouth Bank, as Trustee of the Frank M. Young, III Trust Under Agreement

AmSouth Bank, as Trustee of the Drayton Nabers Trust Under Agreement

AmSouth Bank, as Trustee of the Naldo A. Roberts Revocable Trust

AmSouth Bank, as Trustee of the Nancy M. McAdoo 1978 Trust Under Agreement

AmSouth Bank, as Trustee of the V.B. Murray, Jr., Revocable Trust

AmSouth Bank, as Trustee of the John Terry Badham, Sr. Revocable Trust

AmSouth Bank, as Trustee of the L.E. Bashinsky Trust No. 7 for the Benefit of L.M. Bashinsky, III

AmSouth Bank, as Trustee of the L.E. Bashinsky Trust No. 8 for the Benefit of R.B. Bashinsky

AmSouth Bank, as Trustee of the John F. Mummert Marital Trust

AmSouth Bank, as Trustee of the John F. Mummert Testamentary Family Trust

AmSouth Bank, as Trustee of the Trust Under the Will of Alice Maring for the Benefit of Anne Wiley

AmSouth Bank, as Trustee of the J. Edgar Bowron Trust for the Benefit of Irene M. Bowron

AmSouth Bank, as Trustee of the Trust Under the Will of H. Sanson for the Benefit of F. Cabaniss

AmSouth Bank, as Trustee of the Robert R. Meyer Testamentary Trust D

AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of W. Cabaniss, Jr.

AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of F.C. Parnegg

AmSouth Bank, as Agent for Henry P. Johnston

AmSouth Bank, as Agent for Louise F. Johnston

AmSouth Bank, as Agent for the Roden Coal Company Investment Agency

AmSouth Bank, as Agent for Pauline B. Pinto

AmSouth Bank, as Custodian for Patricia F. Watkins

AmSouth Bank, as Executor of the Perrin M. Porter Estate

AmSouth Bank, as Executor of the William Hawkins Ellis Estate

AmSouth Bank, as Trustee of the Margaret O. Badham Revocable Trust

AmSouth Bank, as Trustee of the J.M. Burt Testamentary Trust

AmSouth Bank, as Trustee of the M.H. & F.M. Young, III Trust for the Benefit of F.M. Young, IV

AmSouth Bank, as Trustee of the M.H. & F.M. Young, III Trust for the Benefit of M.C. Young

AmSouth Bank, as Agent for Hanna Company, Inc.

AmSouth Bank, as Trustee of the Trust Under the Will of W.M. Spencer, Jr.

AmSouth Bank, as Trustee of the Ethelyn H. Bond Revocable Trust

AmSouth Bank, as Trustee of the J. B. Pritchett Testamentary Trust

AmSouth Bank, as Trustee of the Florence Bush and Children's Trust D dated October 21, 1954 Under Agreement with A. P. Bush

AmSouth Bank, as Agent for Anne Fonde Strauss Fies

AmSouth Bank, as Trustee for Shotts Walburn McCord Profit Sharing Plan, Walburn Account

AmSouth Bank, as Trustee for Shotts Walburn McCord Money Purchase Pension Plan, Walburn Account

AmSouth Bank, as Trustee of the Willis Penfield Revocable Trust

AmSouth Bank, as Trustee of the Kathryn Seay Revocable Trust

AmSouth Bank, as Trustee of the Herrod Sherwood Self Employed Retirement Plan, Sherwood Account

AmSouth Bank, as Trustee of the Herrod Sherwood Self Employed Retirement Plan, Herrod Account

AmSouth Bank, as Executor of the Estate of James M. Fairley

AmSouth Bank, as Trustee of the Joan C. Harrison Revocable Trust

AmSouth Bank, as Trustee of the Leo Mendel Family Trust

AmSouth Bank, as Trustee of the Leo Mendel Marital Trust

AmSouth Bank, as Trustee of the Morris Sokol Revocable Trust

AmSouth Bank, as Co-Trustee of the Laurie Amanda Oden Testamentary Trust

AmSouth Bank, N.A. and Marvin Cherner, Co-Executors of the Estate of Kaciel Cherner, deceased

AmSouth Bank, N.A., as Trustee for the Greater Birmingham Foundation W. Felix Harris, Jr. Designated Fund

AmSouth Bank, in its representative capacity for all persons or entities which (i) tendered their ABC shares to Drummond, as hereafter defined, pursuant to the tender offer of December 4, 1984; (ii) sold, transferred, acquired, distributed or disposed of their ABC shares other than in the tender offer or merger; or (iii) relinquished their shares pursuant to the cash-out merger accomplished by Drummond and ABC in August of 1985

AmSouth Bank of Alabama

AmSouth Bancorporation

DURKEE PETITIONERS

John M. Adams
Amy Neal Ager
John Allen Bearden and Frances W. Bearden
Barney Bernstein
Pauline W. Bernstein
Richard Bernstein
Gayle D. Boon
Arthur B. Durkee, Jr.
Katherine Agee Durkee
Elizabeth Ann Ellett and John Howard Ellett
Elizabeth Ann Ellett and John Howard Ellett, as Co-executors of the estate of Howard K. Ellett
Trudy R. Evans as Custodian for Walter B. Evans, Jr.
Trudy R. Evans as Custodian for John Parker Evans, II
Walter B. Evans
Fairfield Avenue Property
Fredrika L. Felt
Joel Felt
James W. Gewin
James W. Gewin, as executor of the Estate of Anna S. Gewin
Lee Gewin
Bradley M. Gewin as Trustee for Leslie S. Gewin
Bradley M. Gewin, as Trustee for William Hampton Gewin
James W. Gewin, as Trustee for Juliette G. Hamner
James Green, Jr.
Richard M. Compton, as Executor of the Estate of Madeleine Hatcher
Mrs. Frank C. Jones
Margaret McCormack Jones
Elvira C. McMillan and Thomas Edwin McMillan
Mrs. William Mobley
First Alabama Bank as personal representative of the estate of Mary Elizabeth Agee

Frederick W. Murray, Jr., as Trustee for Virginia W. Murray Revocable Trust

Frederick W. Murray, Jr., as Trustee for Frederick W. Murray Revocable Trust

Phil H. Neal, Jr.

Phil C. Neal

Sarah B. Neal

Phil Hudson Neal, III

Phil H. Neal, Jr., as Trustee for Samuel Abney Britton Neal

Phil H. Neal, Jr., as Co-Trustee for Marital Trust of Phil H. Neal, Sr.

Phil H. Neal, Jr. and First Alabama Bank as co-executors of the Estate of Amy Gross Neal

Marion D. Pennington and SouthTrust Bank of Alabama, N.A., Co-Trustees of the Edward W. Pennington Marital & Family Trusts

SouthTrust Bank of Alabama, N.A., as executor of the estate of Gena H. Windham

SouthTrust Bank of Alabama, N.A., as executor of the estate of Elizabeth C. Dannelly

Moore W. Peregrine and Phil C. Neal, as co-executors of the estate of and personal representatives of Carrie C. Neal

Elberta G. Reid

Josephine W. Simpson

Virginia E. Simpson

Elizabeth B. Simpson

Louise H. Southerland, as trustee under the will of Jack R. Wilson

Harry R. Teel

Jesse T. Todd, Sr.

Anne Blair Wrinkle

Margaret Rucker Wrinkle

Louise Agee Wrinkle

John N. Wrinkle

RESPONDENTS

Drummond Company, Inc.
Drummond Coal Sales, Inc.
Charles W. Adair
Elbert A. Drummond
Garry N. Drummond
Joseph E. Nicholls, Jr.
Alma Moss Self as Executrix of the Estate of Raymond Weaver Self, deceased

APPENDIX B

Rule 29.1 Listing

Petitioner, AmSouth Bank, N.A.'s, parent corporation is AmSouth Bancorporation

Petitioner, Car & Company, is now known as Troy Bank & Trust Company

Petitioner, Centennial Casualty Company, is a wholly-owned subsidiary of Auction Insurance Agency, Inc.

Petitioner, Equitable Trust Company, is a subsidiary of Equitable Securities Corporation

Petitioner, First Alabama Bank's, parent corporation is Regions Financial Corporation

Petitioner, Jackson Holding Company's, subsidiary corporation is Jackson Insurance Agency, Inc.

Petitioner, Mercantile Safe Deposit & Trust Co.'s, parent corporation is Mercantile Bankshares Corporation

Petitioner, North Carolina National Bank, now known as Nations Bank of Florida, NA's, parent corporation is Nations Bank Corporation

Petitioner, SouthTrust Bank of Alabama, N.A.'s, parent corporation is SouthTrust Corporation

NONE OF THE OTHER CORPORATE PETITIONERS HAS A PARENT CORPORATION OR NON-WHOLLY-OWNED SUBSIDIARY.

APPENDIX C

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1995

1930066

John H. Martin, et al.

v.

Drummond Company, Inc., et al.

1930067 and 1930070

AmSouth Bank,
as trustee of the Leo Mendel Family Trust, et al.

v.

Drummond Company, Inc., et al.

1930068 and 1930069

Arthur B. Durkee, Jr., et al.

v.

Drummond Company, Inc., et al.

Appeals from Jefferson Circuit Court
(CV-91-0143, 91-3431, and 91-3426)

ALMON, JUSTICE.

The plaintiffs, former holders of stock in Alabama By-Products Corporation ("ABC"), appeal from a summary judgment for the defendants on the plaintiffs' claims that the defendants acquired their stock through coercion, fraud, or breach of fiduciary duty. The same claims were presented in a class action in the Delaware Chancery Court of New Castle County, *Hynson v. Drummond Corp.* (CV 7904, Del. Ch. 1990), and were extinguished in a settlement awarding damages to the plaintiff class. The issue is whether the *Hynson* judgment bars this action under the doctrine of res judicata or is not binding on these plaintiffs on the basis that the Delaware Chancery Court certified the class without giving class members the right to exclude themselves from the action.[1]

I.

This dispute concerns the value of the stock of ABC, a Delaware corporation, at the time it was acquired by Drummond Coal Company, Inc., now Drummond Company, Inc. ("Drummond"). In 1977, Drummond, through a subsidiary, acquired a controlling interest in ABC. It thereafter initiated several attempts to merge ABC into Drummond. In response to one such attempt in 1983, several ABC stockholders formed the

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[1] By an amendment to the complaint, the plaintiffs alleged that they were not barred by the *Hynson* judgment because their interests had not been adequately represented in that action, but they do not make that argument on appeal.

Shareholders' Protective Committee ("SPC"). The members of the SPC were lawyers and stockbrokers in Birmingham. ABC stock was traded over the counter, and Sterne, Agee & Leach, Inc., a Birmingham investment firm, was the principal market maker of ABC stock. A senior member of the firm was one of the members of the SPC. The SPC opposed Drummond's 1983 attempt to merge ABC into Drummond for $65 per share of ABC stock. In 1982, market bid prices for ABC ranged from a high at the beginning of the year of $69 to a low at the end of the year of $44, which is about where it stood on March 17, 1983, when the $65 merger proposal was announced. The SPC obtained information on ABC through a court action, hired an analyst to derive a value for ABC stock, and took the position that the stock was worth more than $100 per share. It sent a detailed explanation of its valuation to the stockholders other than Drummond. Drummond sought an independent evaluation from Kidder, Peabody & Co., which informed Drummond that it was "unable to conclude that the consideration ... is fair from a financial point of view to [the] shareholders." Drummond withdrew the 1983 merger proposal in September.

On December 5, 1984, Drummond made a tender offer to pay $75 per share for all of the shares of ABC that it did not own.[2] The tender offer circular detailed the history of Drummond's acquisition of a majority interest, of its efforts to acquire the remainder of the stock, and of other valuations of the stock, including the SPC's valuation of the stock at more than $100 per share. The circular stated: "The Offerors[3] believe that the cash price of $75 per Share offered hereby is fair to unaffiliated ABC stockholders." This statement forms the basis of the allegation of fraud against Drummond; the plaintiffs here contend, as did the class

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[2] Market trades for ABC stock in 1984 before the tender offer ranged between $48 and $55. These and the above figures for market trades were included in the tender offer circular.

[3] Drummond and its subsidiary.

representatives in *Hynson*, that Drummond knew that ABC stock was worth substantially more on an asset valuation basis as opposed to a market valuation. A principal factor in the alleged undervaluation is Drummond's knowledge of the value of ABC's proven coal reserves, its timberland, and its cash flow.

Under another section of the circular, entitled "Additional Purchases of Shares and Possible Merger," Drummond stated: "Upon consummation of the Offer and from time to time thereafter, the Offerors and their affiliates will consider alternatives available to them to satisfy their ultimate goal of achieving ownership of the entire equity interest in ABC." Drummond said it might purchase additional shares or it might propose a merger, with the "timing, structure and terms of any merger" to be determined by Drummond later. The circular also stated that, if Drummond acquired 90% or more of the ABC stock, "it could effect a merger with [ABC] on any terms it chose." The following section of the circular, "Effects of Offer, Additional Purchases of Shares and Possible Merger; Future Plans for the Company," stated that Drummond might "propose to the Board of Directors of [ABC] that it consider reduction or elimination of dividends." By the time of the tender offer, Drummond had voting control of the board of directors of ABC—a majority of its members had been placed by Drummond through its control of a majority of the ABC stock.

These representations of an uncertain future for non-tendering shareholders, including the possibility of holding stock that did not pay dividends and would probably not be marketable, form the basis of the allegations by the plaintiffs here and in *Hynson* that the tender offer was coercive.

The board of directors of ABC met quickly in response to the tender offer. Charles Adair, the president and chief executive officer of ABC, who had taken office after Drummond had acquired the majority of the ABC stock and who had previously been Garry Drummond's executive assistant, was in Washing-

ton, D.C., the day the tender offer was announced. Adair flew back to Birmingham on a Drummond Company airplane the next day, and a meeting of the ABC board of directors was held at the Drummond Company hangar. The board of directors of ABC voted to take a neutral position on the tender offer. This action, coupled with the board's alleged failure to inquire into the fairness of the offering price or any other aspects of the tender offer, is the basis of the allegations of breach of fiduciary duty against the board members who are the individual defendants in this action and who were defendants in *Hynson*.

On December 18, the SPC wrote a letter to many of the ABC stockholders indicating its opposition to the tender offer and stating, "The Committee continues to believe that the ABC stock has a value of not less than $100 per share." Among the reasons given by the SPC for its belief that "the disclosures made by Drummond are not adequate" were that "Drummond has not given consideration to the liquidation value of ABC"; "Drummond has failed to inform the public stockholders of ABC as to the value of the coal resources and reserves of ABC"; "ABC has approximately 60,000 acres of timberlands," the value of which was not disclosed by Drummond; and Drummond's income projections for ABC were low. In short, the very points now alleged as bases for the fraud allegations were known to the ABC stockholders at an early stage in the tender offer, if not before.

Enough ABC shareholders responded to the tender offer that Drummond acquired through the tender offer, together with the stock it already owned, approximately 91% of the outstanding stock of ABC. It effected a short-form merger in August 1985 and acquired, for $75.60 per share, the remainder, except that some of the remaining ABC stockholders filed for an appraisal and obtained a higher price, as explained below. The plaintiffs in the actions below, appellants here, owned ABC stock that Drummond acquired either through the tender offer or through the merger.

On January 4, 1985, less than a month after Drummond made the tender offer, several ABC stockholders filed a class action, *Hynson v. Drummond Coal Co.*, *supra*, in the Delaware Chancery Court of New Castle County on behalf of a class of all ABC stockholders other than the defendants. On December 3, 1985, several shareholders who did not tender their shares and who objected to the merger filed an action in the Delaware Chancery Court of New Castle County for a judicial appraisal of their shares. *Neal v. Alabama By-Products Corp.*, CV No. 8282 (Del. Ch. 1990).[4] The *Neal* plaintiffs were excepted from the *Hynson* class. Many of the plaintiff ABC shareholders tendered some shares, surrendered some in the merger, and held some for appraisal, or otherwise deliberately took advantage of two of these three options.

In a settlement of *Hynson* in November 1989, Drummond agreed to pay about $5,000,000, approximately an additional $5 per share of ABC stock. Notice of the settlement was mailed to the class members on November 29, 1989. The notice did not give the class members a right to opt out, but it did provide the following:

> "Any member of the Class who objects to the certification of the Class, the Stipulation, the Settlement, the judgments with respect thereto, and/or the award of attorneys' fees and expenses to plaintiffs' counsel, or who otherwise wishes to be heard, may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant. . . .
>
> "Any person who fails to object in the manner prescribed above shall be deemed to have waived such objection and shall be forever barred from raising such objection in this or any other action or proceeding."

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[4] The appeal of *Neal* is reported as *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

On February 1, 1990, a hearing was held on the *Hynson* settlement, and no class member objected to the settlement or requested exclusion from the action. The Delaware Chancery Court entered a judgment approving the settlement and enjoining any class member from bringing any other action asserting any of the settled claims against any of the defendants.

Meanwhile, the *Neal* appraisal action had been tried from June 17, 1989, through July 7, 1989. The Delaware Chancery Court did not enter a judgment until August 1, 1990, when it found an appraised value of $180.67 per share. That judgment was affirmed. *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

The *Neal* valuation prompted the instant actions. The first complaint was filed by John H. Martin; amendments to his complaint added approximately 336 named plaintiffs.[5] Arthur B. Durkee, Jr., and others filed motions to intervene and complaints in intervention. AmSouth Bank, as trustee of a number of trusts owning ABC stock, also filed a motion to intervene and filed a complaint in intervention. All plaintiffs had been members of the *Hynson* class. The defendants named in these complaints had all been defendants in *Hynson*. The allegations of wrongdoing in these present cases are essentially the same as those made in *Hynson*.

II.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985), the United States Supreme Court held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, *even though that plaintiff may not possess* the *minimum contacts with the forum* which would support personal jurisdiction over a defendant" (emphasis added). The Court further held:

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[5] Significantly fewer persons were actually involved, because, for example, numerous plaintiffs were named individually and as trustees of several trusts.

> "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,[3] it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, *we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.* Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.
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> "
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> "[3] Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class."

Id., at 811-12 (citations omitted; emphasis added).[6] The plaintiffs rely on the emphasized language quoted above from *Phillips*

[6] A question similar to the one presented here was recently presented to the United States Supreme Court—"[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf"—but the Court dismissed the writ of certiorari as improvidently granted. *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, ___, 114 S. Ct. 1359, 1361 (1994).

Petroleum v. Shutts to contend that, because the Delaware Chancery Court failed to give them, as absent class plaintiffs,[7] the right to opt out of *Hynson*, its judgment does not bind them and does not bar their Alabama actions on the same subject matter. The Jefferson County Circuit Court entered a summary judgment for the defendants, holding that the res judicata effect of the Delaware judgment bars these actions.

III.

The parties argue at length regarding the *Shutts* statement that due process requires that a plaintiff class member in a class action for money damages be given a right to opt out of the action. The majority of this argument becomes irrelevant, however, when we start from the proposition emphasized in our first quotation from *Shutts*, which indicates that its holding pertains when the plaintiff class members do not have such contacts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant. The plaintiffs have such contacts here, consisting of: their ownership of stock in a Delaware corporation; the fact that *Hynson* concerned the value of that stock; and their participation in *Hynson*, indicating submission to the Delaware court's jurisdiction. Furthermore, they received all of the due process components required by *Shutts*—notice, an opportunity to be heard, the best practicable notice, a description of the action and their rights in it, and adequate representation—lacking only an express right to opt out. The Delaware Supreme Court, however, had provided, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), a discretionary right to opt out even in class actions that did not give an absolute right to opt out, and none of these plaintiffs objected to the failure to give a right to opt out or requested the

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[7] "Absent class plaintiff" refers to a plaintiff who is not a named party, not necessarily to a plaintiff who is absent from the jurisdiction. *Hansberry v. Lee*, 311 U.S. 32 (1940); 1 H. Newberg and A. Conte, *Newberg on Class Actions* § 1.02 (3d ed.).

Hynson court to allow them, within its discretion, to opt out. For all these reasons, the plaintiffs should not now be allowed to collaterally attack the *Hynson* judgment.

IV.

Both Delaware and Alabama have adopted the federal class action rules. Relevant here is the distinction between certification of classes pursuant to Rule 23(b)(1), (b)(2), and (b)(3), Del. Court of Chancery Rules:

> "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:
>
> > "(1) The prosecution of separate actions by or against individual members of the class would create a risk of:
> >
> > > "(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > > "(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> "(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corre-

sponding declaratory relief with respect to the class as a whole; or

"(3) The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

"(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

"(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

"(D) The difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) imposes heightened requirements for class actions maintained pursuant to Rule 23(b)(3), including the right to opt out:

"(2) In any class action maintained under paragraph (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members

who can be identified through reasonable effort. The notice shall advise each member that:

> "(A) The Court will exclude him from the class if he so requests by a specified date;
>
> "(B) The judgment, whether favorable or not, will include all members who do not request exclusion; and
>
> "(C) Any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

When a class action is maintained pursuant to Rule 23(b)(1) or (b)(2), Rule 23(c)(3) contemplates that members will not be given the opportunity to opt out, but, on the contrary, that all members will be bound by the judgment:

> "(3) The *judgment* in an action maintained as a class action under paragraph (b)(1) or (b)(2), whether or not favorable to the class, *shall include* and describe those whom the Court finds to be *members of the class*. The judgment in an action maintained as a class action under paragraph (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph (c)(2) was directed, and who have not requested exclusion, and whom the Court finds to be members of the class."

(Emphasis added.) The corresponding provisions of Rule 23 in the Alabama and Federal Rules of Civil Procedure are substantially identical.

The *Hynson* court certified the class as a Rule 23(b)(1)(A) and a Rule 23(b)(2) class. All plaintiff class members were given notice of the action, although, as stated above, the notice did not inform the class members that they could opt out of the class.

V.

After Martin and the other plaintiffs filed these actions, the defendants filed in *Hynson* a motion pursuant to Rule 60(b)(3) and Rule 23, Del.R.Civ.P., for an order confirming that *Hynson* was properly certified as a class action under Rule 23(b)(1) and (b)(2). Chancellor Allen, who presided over the *Hynson* proceedings, acknowledged that the question whether the judgment in *Hynson* barred the actions at issue here "is ultimately a question of federal law that is to be answered in the first instance by the courts of the State of Alabama." He nevertheless entertained what he described as "this procedurally unusual motion," because "these claims cast a shadow on this court's processes," because he had not addressed the certification issue in writing during the pendency of *Hynson*, and because "it may be helpful to later courts to have this court's view." He entered an order on June 14, 1991, which is reported as *Hynson v. Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991); the above-quoted remarks appear at p. 571. We respectfully acknowledge Chancellor Allen's efforts toward resolving this dispute, and we appreciate his views.

Chancellor Allen expressed the question and his resolution of it thus:

> "The central question raised by this motion is of general importance. It is whether a single jurisdiction with *in personam* jurisdiction over the corporation and all of its directors may, in a single action, conclusively adjudicate whether a corporation's directors have satisfied their fiduciary duties to the corporation and its shareholders in the context of a corporate merger or other corporate transaction. *See Nottingham Partners v. Dana*, Del.Supr., 564 A.2d 1089 (1989); *In the Matter of Colt Indus. Shareholders' Litig.*, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991).

"This question was left unanswered by the Supreme Court of the United States in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts* the Supreme Court held that, so long as class members are afforded an opportunity to 'opt-out' of the action, the due process clause does not require that all members of a plaintiff class have such 'minimal contacts' with the forum jurisdiction as would sustain *in personam* jurisdiction over each class member under the analysis of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *See Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974. The court noted its holding was 'limited to those class actions concerning claims wholly or predominately for money judgments. We [the Supreme Court] intimate no view concerning other types of actions, such as those seeking equitable relief.' *Shutts*, 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3.

"In this action, absent plaintiff class members were afforded no right to opt-out. This case therefore raises the question that the presence of such a right eliminated in *Shutts*: whether, in order to be preclusively bound by a judgment in a properly conducted Rule 23(b)(1) or (b)(2) action (in which no opt-out option is provided), a member of the class must have a sufficient nexus with the rendering jurisdiction as to make permissible exercise of *in personam* jurisdiction over that person, with respect to the claims in issue? The question as it arises here is, of course, not so general as that. This case involves a particular class of litigation: stockholder action against corporate fiduciaries. That fact supplies important context for addressing the subsidiary question: whether ownership of corporate stock itself constitutes such a relationship with the corporate domiciliary jurisdiction that it is fair to

subject the holder of stock to that jurisdiction for the purpose of adjudicating the existence or contours of corporate rights that attach to stock ownership.

"For the reasons set forth below, considerations both of efficiency and fairness in our federal system, in my opinion, require that a single adjudication be available in which charges of breach of a director's or controlling shareholder's duty to a corporation and its shareholders may be conclusively determined and all holders of stock bound. It is further my view, as explained below, that where the issue is whether a plaintiff class may be bound to an adjudication of the equitable duty of loyalty created by the law of the incorporating state, that the purchase (or merely holding) of the shares of a corporation of that state itself creates a sufficient relationship with that jurisdiction to permit that jurisdiction to be one in which rights attaching to stock of the corporation may be conclusively adjudicated."

601 A. 2d at 571-72.

Chancellor Allen also expressed his conclusion as follows:

"In my opinion, the device of a properly administered class action may be employed, without affording opt-out rights, to bind all absent shareholder/plaintiffs to a final judgment in an action seeking to vindicate rights attaching to corporate stock, whether those rights are sought to be protected by injunction or compensated by an award of money."

601 A.2d at 575. Without detailing all of Chancellor Allen's reasoning, we note the following point he expressed:

"The traditional rule (and still the rule by statute with respect to Delaware corporations)[n] is that stock has its legal situs in the domiciliary jurisdiction. *See* 11 W.

> Fletcher, *Cyclopedia Corporations*, § 5101 (Perm. ed. 1982). [n.]*See* 8 *Del. C.* § 169 (1983)."

601 A.2d at 576.

VI.

Chancellor Allen's reliance on these plaintiffs' stock ownership as giving the Delaware court jurisdiction over them presents a possible problem of compliance with *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the United States Supreme Court held that Delaware's assertion of jurisdiction over a dispute between stockholders and the directors of the corporation by sequestering the directors' stock in the Delaware corporation violated the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court held that the defendants' ownership of stock in a Delaware corporation did not give jurisdiction to the Delaware courts over the defendants where the dispute had nothing to do with the corporate stock.[8] Although the Court disapproved the use of such *quasi in rem* jurisdiction to attach the defendants' property and to make them subject to personal jurisdiction to avoid loss of that property where the property had nothing to do with the cause of action, it said that the argument for applying *International Shoe*'s "minimum contacts" test to assertions of *in rem* jurisdiction

> "does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it

[8] Instead, the action alleged mismanagement by the defendant directors and officers of the corporation's business, leading to substantial liabilities of the corporation. The Court cited the fact that several of the defendants did not own stock in the corporation and thus were not brought into court in Delaware through the sequestration procedure as evidence that the claim did not in fact relate to the ownership by most of the defendants of stock in the corporation.

> would be unusual for the State where the property is located not to have jurisdiction. . . .
>
> "It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk*[, 198 U.S. 215 (1905),] and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."

433 U.S. at 207-09 (footnotes omitted).

Thus, it at least appears that *Shaffer* may be distinguishable on the basis that the ownership of stock in ABC is directly related to the cause of action. The Court of Appeals for the Third Circuit held in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 480, 130 L. Ed. 2d 393 (1994):

> "An appropriate basis for the Delaware court's power to bind non-resident shareholders in such a proceeding is ownership of Vitalink stock[6] together with any other activity engaged in by the members of the class pursuant to their shareholder rights. Thus, in this collateral attack we are concerned with whether the Delaware Court of Chancery had specific jurisdiction to bind non-resident members of the plaintiff class like Holbrook.
>
> "In the present case, plaintiff Holbrook and all other class members owned stock in Vitalink, a Delaware corporation. Nevertheless, we need not decide whether the single act of purchasing and owning stock in a

> Delaware corporation would provide sufficient contacts for the state court to exercise specific jurisdiction over every member of the class because the record discloses that Holbrook had an important further contact with the Delaware forum. By surrendering his shares in response to the tender offer with knowledge of his status as a member of the plaintiff class in a pending class action lawsuit containing all the attendant procedural protections designed to ensure that only a fair and adequate settlement judgment would be entered by the court, Holbrook purposefully availed himself of the privilege of having the Delaware Court of Chancery finally, and in a single lawsuit, determine the adequacy of the settlement agreement, 'thus invoking the benefits and protections of its laws.' *Hanson v. Denckla*, 357 U.S. 235, 238, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).
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> "[6] The state of Delaware is the situs of ownership of all stock in Delaware corporations. Del. Code. Ann. tit. 8, § 169 (1991)."

17 F. 3d at 1559-60.

A detailed record was built in this case of the acts taken by each former stockholder who is a plaintiff here in response to the notices sent them in *Hynson*.[9] Several of the plaintiffs here were also plaintiffs in *Neal*, having held some of their stock for an

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[9] The Third Circuit relied on Holbrook's tender of his shares as the additional element establishing the necessary contacts. Here, all of the plaintiffs either tendered their stock in response to the tender offer or surrendered them in the merger. They argue that these acts did not establish sufficient contacts with Delaware, however, because the tendering shareholders were to deliver a letter of transmittal either by mail to New Jersey or by hand in New York. Alternatively, the shares could be transferred by book entry in New York. None of this, they say, established sufficient contacts with Delaware. The defendants do not respond to this argument, so we do not rely on the tender as establishing the necessary contacts.

appraisal after either tendering some of it in response to the tender offer or surrendering some of it in the merger. Thus, they purposefully availed themselves of the benefits of the law of Delaware by invoking its statutory appraisal procedure as to part of their stock. Others among the plaintiffs, principally the AmSouth trusts, filed proofs of claims in *Hynson*. They counter Drummond's argument on this point by noting that they were members of the class without having filed such proofs of claims and arguing that their filings were therefore insignificant, but we deem them significant as showing an intent to submit to the jurisdiction of the *Hynson* court. A much larger number of the plaintiffs here returned W-9 forms, by which they prevented "backup withholding" of federal income tax from their settlement proceeds. Again, the plaintiffs contend that the returning of these forms was inconsequential to the Delaware court's jurisdiction, but again we disagree. The plaintiffs, by returning these forms, expressed an interest in receiving proceeds from the *Hynson* settlement—indeed, they affirmatively indicated they wanted to receive 100% of those proceeds, not just 80%.

VII.

Significantly, the Supreme Court of Delaware had provided, before *Hynson* was filed, a mechanism whereby a right to opt out may be provided even if the chancery court certifies the action as a Rule 23(b)(2) action. That court held, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), that an action for both injunctive and monetary relief may be certified as a (b)(2) action, provided that monetary relief is not the predominant remedy.

> "The Court of Chancery found that although the Dana complaint contained an alternative prayer for damages, the *primary* relief sought and *obtained* in the Settlement was declaratory, injunctive and rescissory. Thus, the Court of Chancery found that the Dana action satisfied the second (b)(2) requirement of *primarily* seeking similar equitable relief with respect to

> the class as a whole. ... We are satisfied that both of these conclusions are supported by the record. We affirm the decision of the Court of Chancery to certify the Dana action pursuant to subsection (b)(2) of Chancery Court Rule 23."

564 A.2d at 1096-97 (emphasis in original; citations and footnotes omitted). The court proceeded to hold that, in such a case, a chancery court could, in its discretion, allow a member of the class to opt out:

> "We have concluded that when a portion of the relief which is sought is monetary, a member of a class certified under rule 23(b)(2) has a Constitutional due process right to notification[28] but not a right to opt out of the class. . . . Nevertheless, the Court of Chancery has discretionary power, under its Rule 23(d)(2)[,] to provide for an opt out right and to require that notice thereof be given, if it believes that an opt out right is necessary to protect the interest of absent class members. ... In exercising its discretion, before deciding whether or not to extend an opt out privilege as part of a subsection (b)(2) certification, the Court of Chancery must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court. The ability to opt out of the class always involves the potential for a multiplicity of lawsuits and variations in adjudication which class actions are intended to prevent.
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> "

"[28] The right to notification affords the absent class member an opportunity to ask the court to afford it a right to opt out of the Rule 23(b)(2) class if such a right was not provided for in the notice. *See* [Fed.R. Civ.P. 23 Advisory Committee's Note (1966), *reprinted in* 39 F.R.D. 95 (1966)], at 106-07. In this case, Nottingham was able to make such an argument. Moreover,

> since it was notified of the proposed Settlement, prior to the class certification, in addition to objecting to the Settlement, Nottingham was able to argue the merits of the decision to certify the Dana action under subsection (b)(2) instead of subsection (b)(3)."

564 A.2d at 1101 (citations and other footnotes omitted). The Supreme Court of Delaware held that the Court of Chancery did not abuse its discretion in its decision "not to afford Nottingham the right to opt out of the Dana class action." *Id.*

The Supreme Court of Delaware has thus provided a vehicle for challenging a non-opt-out certification and for obtaining a discretionary exclusion, of which these plaintiffs did not avail themselves. If any of the plaintiffs here had challenged Chancellor Allen's order on appeal, the Supreme Court of Delaware might well have reversed on the authority of *Nottingham Partners*. Instead, most of these plaintiffs affirmatively indicated their willingness to participate in the *Hynson* settlement. Many of them returned W-9 forms to avoid backup withholding of federal income tax from the settlement proceeds they were to receive. Others filed proof of claim forms. All of them received notice by first class mail, but none of them objected to the settlement. The majority of these plaintiffs are sophisticated investors, and virtually all the rest of them had the benefit of the efforts on their behalf undertaken by the Shareholders' Protective Committee in response to Drummond's 1983 merger attempt. Under these circumstances, we cannot say that these plaintiffs were deprived of notice and an opportunity to be heard or that the procedures in the Delaware court fell so far short of "fairly insur[ing] the protection of the interests," *Hansberry v. Lee*, 311 U.S. at 42, of the absent class members as to make it unnecessary to request in the Delaware court that they be excluded from the action.

VIII.

We are not sure how far *Shutts* and *Shaffer* reach in this situation; indeed, the United States Supreme Court, as we read

Ticor, seems unsure of the reach of *Shutts*. Clearly, *Shutts* requires, in a class action for monetary damages, opt-out rights for class members who do not have sufficient contacts with the class action forum.[10] Just as clearly, *Shaffer* disallows the exercise of jurisdiction *quasi in rem* when the property is unrelated to the cause of action and the defendant does not have sufficient contacts with the forum. However, *Shaffer* is unclear as to whether the ownership of stock in a corporation incorporated in the forum state would support jurisdiction over the owner in an action alleging deprivation of rights arising out of that ownership. Even if it would not always support such an exercise of specific jurisdiction, we, like the Third Circuit in *Grimes*, hold that the plaintiffs' stock ownership, together with their activities indicating a willingness to participate in the settlement, established the necessary contacts and made it fair and reasonable under all of the circumstances for the class action court to exercise jurisdiction over their claims.

IX.

The foregoing discussion sets forth our conclusion that the plaintiffs in these present cases who had sufficient contacts with Delaware in connection with the *Hynson* proceedings are barred from relitigating the claims settled in *Hynson*. This answers the

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[10] We have examined numerous cases, treatises, and authorities applying or discussing *Shutts*, and we find none inconsistent with the result we reach here. *See, e.g., Brown v. Ticor Title Ins. Co.*, 982 F. 2d 386 (9th Cir. 1992), cert. dismissed, *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, ___, 114 S. Ct. 1359 (1994); *In re Real Estate & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989); *Colt Industries Shareholders Litig.*, 77 N.Y.2d 185, 566 N.E.2d 1160 (1991); *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993); 1 H. Newberg and A. Conte, *Newberg on Class Actions*, §§ 1.14-1.23 (3d ed. 1992); 7A Wright, Miller, and Kane, *Federal Practice and Procedure: Civil*, § 1757 (2d ed. 1986); 7B *Id.*, § 1789; A. Miller and D. Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1 (1986).

claims of most of the plaintiffs, and it may answer the claims of all plaintiffs. However, we are left with the possibility of remanding the cause for individualized findings as to any plaintiffs who may not have established any contacts with Delaware other than the holding of ABC stock. Under the facts and circumstances of this case, we do not find it necessary for such individualized determinations.[11]

Some constitutional rights may be waived if not timely asserted.

> "[A] failure to assert constitutional rights at the appropriate time and place constitutes a waiver of those rights. *City of Huntsville v. Gudenrath*, 194 Ala. 568, 69 So. 629; *City of Birmingham v. Wills*, 178 Ala. 198, 59 So. 173; *City of Mobile v. Smith*, 223 Ala. 480, 136 So. 851. It was stated by the Court in *Vernon v. State*, 240 Ala. 577, 200 So. 560, cert. den., *Vernon v. Wilson*, 313 U.S. 559, 61 S.Ct. 837, 85 L.Ed. 1519:
>
> > "'So also, * * * one may waive and does waive his constitutional rights if he fails to assert or claim them at the appropriate time and place and according to the established course of procedure.'

---

[11] The plaintiffs correctly point out that a "minimum contacts" test for whether an absent class plaintiff who was not allowed opt-out rights can collaterally attack the judgment will lead to uncertainty in class settlements. However, with *Shutts* as the dispositive law on point, the only alternative would be to say that, in any plaintiffs' class action for monetary damages, if no opt out rights were given, *all* absent class plaintiffs (except, presumably, those who have accepted settlement proceeds and signed releases) can collaterally attack the judgment. If the *Shutts* rule is not a matter of *in personam* jurisdiction, it seems that residents of the forum state and others with ample contacts would not be bound by a class judgment unless they were expressly given the right to opt out. We decline to hold that due process requires such a broad right of collateral attack regardless of contacts with the forum and regardless of other protections that were given the absent class members.

> "In *Alabama Cartage Co., Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen*, 250 Ala. 372, 34 So. 2d 576, 2 A.L.R.2d 1273, the following statement of the rule of waiver was approved:
>
> > "'"A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and, having once done so, he cannot subsequently invoke its protection."'"

Barnes v. State ex rel. Ferguson, 274 Ala. 705, 711, 151 So. 2d 619, 624 (1963).

An objection based on a lack of jurisdiction over the person may be waived by appearing and not contesting the court's jurisdiction. Rule 12(h)(1), Ala. R. Civ. P., provides:

> "A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. . . ."

See 2A *Moore's Federal Practice*, ¶ 12.23 (2d ed. 1991). See also Rule 12(b)(2), motion raising defense of lack of jurisdiction over the person, and Rule 12(g), consolidation of defenses in motion. This rule, of course, is stated in regard to a defendant, as to whom the question of *in personam* jurisdiction is ordinarily presented. It does not apply neatly to an assertion by a person who was an absent member of a previously pending class action, because it is not ordinarily contemplated that absent class members will enter appearances or raise "defenses" of lack of jurisdiction over the person. However, we conclude that any objec-

tions by any of the present plaintiffs to the *Hynson* court's jurisdiction over them have been waived, for the following reasons: all of the absent *Hynson* class members received notice of the action and of the pending settlement; the *Hynson* court had at least colorable jurisdiction over the absent class plaintiffs, because they were stockholders of the corporation whose stock was the subject of the class action; Delaware, as stated in *Nottingham Partners*, provided a discretionary right to opt out even of class actions certified under Rule 23(b)(1) or (b)(2); and none of the absent class members in *Hynson* expressed any objection to the settlement or any interest in exclusion from the action until long after it was settled and after an independent but related appraisal action reflected a higher value than the settlement gave. The interest of these plaintiffs in opting out of *Hynson* arose only after the much higher stock valuation of *Neal* gave them, in hindsight, a dissatisfaction with the *Hynson* settlement. Thus, we hold that, in the circumstances of this case, the doctrine of *res judicata* bars the plaintiffs' relitigation of the claims that were settled in *Hynson*.

For the foregoing reasons, we conclude that the judgment in *Hynson* is binding on the plaintiffs. The summary judgment is due to be affirmed.

AFFIRMED.

Maddox, Shores, Cook, and Butts,* JJ., concur.

RELEASED
JULY 7, 1995
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SUPREME COURT OF ALABAMA

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*Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

APPENDIX D

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

Civil Action No. CV 91 043

JOHN H. MARTIN, et al
Plaintiffs

vs

DRUMMOND COMPANY, INC., et al
Defendants

ORDER

This action is submitted on various motions for summary judgments or partial summary judgments and is submitted on argument and briefs of counsel and voluminous documents, depositions, letters and materials. A small forest has contributed its life to this litigation.

A synopsis of this action, as this court sees it, is as follows:

The Alabama By-Products Corporation was a corporation, primarily locally owned, in the business of mining and selling coal and production of coke and possibly other by products. In 1977-78, Drummond purchased the controlling share of the voting stock of ABC. This share represented some 68% of the voting shares of stock. There was some litigation filed in 1978 concerning Drummond and ABC or shareholders which apparently has no bearing on this litigation, but is only material to show the beginning of apparent strained business relationships between Drummond and some of the remaining shareholders. From the time of the initial purchase of stock by Drummond, it was known generally that it was Drummond's desire and purpose to eventually own all the shares of ABC. In the early 1980's, there were many rumors about ABC and Drummond.

Depositions reveal it was common talk in the business and social circles of the Jefferson County area, board members were replaced and officers were changed or replaced.

In March, 1983, Drummond proposed a merger at $65.00 per share which was withdrawn in September, 1983, apparently because the fairness opinion obtained by ABC from Kidder Peabody was not favorable. At about this point of time a Stockholders' Protective Committee was formed by Wyatt R. Haskell, James L. Hendrix, and Henry S. Lynn. The Stockholders Protective Committee (SPC) obtained a list of minority stockholders and sent to each a letter stating the situation, as they [sic] observed it, requesting a donation of twenty cents (.20) a share to finance the defeat of the merger at $65.00 per share and advised [sic] that the assets and resources of ABC were undervalued, and pension fund overfunded and the shares of stock were, in their opinion, worth in excess of $100.00 per share. The SPC examined the books of ABC and hired experts to advise them as to their opinion as to values of ABC. Numerous reports of their findings, values and opinions were sent to the certain shareholders of ABC.

On December 5, 1984, Drummond initiated a Tender Offer of $75.00 per share for any and all outstanding shares of stock of ABC. It appears that Drummond acquired over 90% of the voting stock in the next four or five weeks. In a matter of days after the Tender Offer an action was filed in the U.S. District Court for the Northern Division of Alabama, *Turner, et al, vs. Drummond, et al,* alleging violation of the Securities Exchange Commission rules along with fraud, coercion and breach of fiduciaru [sic] relationship of majority to minority shareholders of stock (these will be referred to as unfair practices). This action was later dismissed by the Federal Court in that the non-tendering shareholders' [sic] plaintiffs had no standing to bring the action. On January 4, 1985, an action was filed in the Chancery Court of Delaware by Richard Hynson, Jr. (*Hynson vs.*

Drummond Coal Company, et al) challenging the Tender Officer [sic] alleging unfair practices, that ABC Directors had breached their fiduciary duties to ABC stockholders, that the Tender Offer was Coercive [sic] and the offering pamphlet was false and misleading. Hynson sought to enjoin the Tender Offer or rescind it and sought an accounting and asked for compensatory and/or rescissory damages. This action was sought to be certified as a class action for Class "A [sic] and "B" stockholders of ABC under Rule 23(b)(2).

On December 3, 1985, Phil Neal, Jr., and others who had not tendered their shares, filed in the Chancery Court of Delaware an action (*Neal, et al, vs Alabama By-Products, et al*) for a judicial appraisal of the fair value of their stock. This complaint alleged "unfair practices" along with the aspect seeking judicial appraisal. The *Neal* case was tried and the Vice Chancellor ruled the fair value of each share was $180.67. The Delaware Court also ruled that the statutory appraisal action could not be enlarged to include claims for fraud and breach of fiduciary duty and this aspect of claim for relief was denied.

The *Hynson* case, after discovery and negotiations, was settled for five million dollars and certified as a class action pursuant to Rule 23(b)(1) and (2). The Delaware Court gave notice of settlement to the class. The notice of settlement did not provide the members of the class the right to "opt out" of the class. No members of the class appeared or opposed the settlement. Further Drummond petitioned the Delaware Court to have a "fairness hearing' [sic] to determine the constitutionality of the *Hynson* settlement. Notice was sent to the class and on hearing date no one appeared or interjected any objection or disapproval of the settlement but one attorney for a group of plaintiffs in this action advised the Delaware Court that his position was that the Delaware Court did not have jurisdiction over the Alabama resident shareholders. The Delaware Court, in a long, well reasoned, opinion determined that a right to "opt out" was not

constitutionally required in the *Hynson* case and held the settlement was fair and free from fraud. The Delaware Court held, in my opinion, that if one holds, buys or acquires stock in a corporation domiciled in a separate state from his residence, this subjects that person to the foreign state's processes to the limited extent necessary to adjudicate their rights as stockholders against the corporation's directors and controlling stockholders and that Delaware had jurisdiction over the class in *Hynson*. Further [sic] that the case of *Phillips Petroleum Co. vs Shutts, 472 U.S. 297,* was "limited to those class actions concerning claims wholly or predominately for money judgments. We (the Supreme Court) intimate no view concerning other types of actions, such as those seeking equitable relief" and that *Hynson* was filed as an equitable action and the fact that it was later settled monetarily does not alter its equitable nature and the constitutional right to opt out of the class as declared in *Shutts* does not apply.

On January 8, 1991, John Martin filed the case, sub judice, which has been joined by several hundred other plaintiffs, alleging "unfair practices" by defendants. In this action, the defendants attempted to have this court enforce the *Hynson* judgment. The plaintiffs argued to the court that due to the failure of *Hynson* to provide for the right to allow a shareholder to "opt out" of the class that *Shutts* applied. The previous judge of this court, presiding over this case, ruled that the plaintiff [sic] are not barred by the Delaware judgment in *Hynson* and that the *Hynson* judgment is void. This was a judgment for a partial summary judgment. This judgment was appealed to the Alabama Supreme Court which dismissed the appeal as not being an appealable order.

The judge originally assigned this case recused himself and this action was reassigned to me. It is now before me on the various motions for summary judgment or partial summary judgment.

Firstly, the defendants move the court to reconsider the previous order of this court's [sic] ruling that the *Hynson* judgment of the Delaware court is unenforceable and void. The plaintiffs strenuously object to reconsideration of this court's previous ruling on *Hynson* and in argument says [sic] that *Hynson* is substantively void, but not procedurally void so as to toll running of the statute of limitations.

In regard to the court's ruling and order of December 11, 1991, concerning *Hynson*, I reach a different conclusion. The *Hynson* case was an equitable action filed in the Chancery Court of Delaware. The Delaware Court could have granted equitable relief if the matter had been fully litigated. The Delaware Court gave adequate notice and right to be heard to absent class members. No member of the class objected or appeared and only one notified the court that the court (Del.) had no jurisdiction over absent class members living in Alabama. The requirement of the right to "opt out" as provided in *Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985)* is not present under these facts and proceedings and said settlement and judgment of the Delaware Court in *Hynson*, in my opinion, is binding on all parties. For it is my opinion that *Hynson* is valid and binding or that the statute of limitations has run on the plaintiffs [sic].

As one plaintiff's brief characterized this action as "The Sting," the plaintiffs' approach can be looked at as how to have your cake and eat it too. The plaintiffs prevailed upon this court to rule the *Hynson* case void, but attempts [sic] to use it to toll the statute of limitations. A void judgment is one where the court lacks jurisdiction over the subject matter or over the parties. A void judgment is one which, from its inception, is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind the parties or to support a right, of no legal force and effect whatever, and incapable of enforcement in any manner or to any degree. *Loyal v. Dir., Dept. of Public Safety, 480 So. 2d 577.* A void judgment is in legal effect no judgment. By it no

rights are devised. From it no rights can be obtained, it being worthless in itself. All proceedings founded upon it are equally worthless. It neither binds nor bars anyone. If my opinion of *Hynson* is in error, the the [sic] limitations of time, two years, has long expired one [sic] bringing this action. Our Supreme Court has held that the filing of a class action tolls the Statute of Limitations until the class is decertified or an independent action is filed. The class action, *Hynson*, was never decertified, in fact it was certified and affirmed, but an independent action, *Neal*, was filed in December, 1985, which triggered the running of the statute of limitations in itself.

In regard to the allegations of this action concerning the Tender Offer pamphlet, the court does not find substantial evidence of fraud. As stated in the *Neal* case, "Value, as beauty, is in the eyes of the beholder." There are various ways and theories in which to arrive at estimations of value, some are beneficial to a seller and some are beneficial to a buyer. As shown in *Neal*, the estimation of value in multimillion dollar corporations may be greatly diverse. The statements in the pamphlet concerning the possible actions in the event over 90% of the stock was acquired merely advised the shareholders of legal possible actions in [sic] event certain thresholds occurred. It could not be coercive, only advisory, and possibly have been fraudulent if not included. As to the argument that the statement in the pamphlet in substance "We believe this is a fair officer" [sic] as being fraudulent will not support an action for fraud. There is a clear distinction between belief and positive knowledge. A person may honestly believe a thing and yet not know it. The word "believe" used in this context is no more than an opinion as to value and not actionable as a fraudulent statement of material fact.

This court takes notice of the various strategies used by the various shareholders, some tendered, some tendered part of their shares and retained part of their shares, some retained all, some

tendered part of their shares and had others judicially evaluated, some had share [sic] evaluated and surrendered others in the eventual "squeeze out." The court finds that the plaintiffs that "split;" that is, retained or tendered some shares while having others judicially evaluated have violated the prohibition against splitting a cause of action. *Terrell v. City of Bessemer, 406 So.2d. 337; Johnson v. Brown Service Ins. Co., 293 Ala. 549, 307 so.2d 518.*

The court further finds the "Tender Offer' [sic] was an arms length transaction. A Tender Offer is a voluntary transaction. In this matter the plaintiffs, even before the Tender Offer was made, considered the pros and cons of said offer, they contacted attorneys and stock brokers, the SPC reported to them, some had committees evaluate the offer, in all, the plaintiffs made considered business judgments, whether good or bad from their viewpoint, they fail to state a claim against these defendants. Apparently, an independent fairness opinion was not necessary as Martin's brief states: "Drummond orchestrated a Tender Offer so as to avoid having to obtain a fairness opinion from an independent Banker." Apparently, a fairness opinion would be necessary in a merger.

For these and other valid reason, this court is of the opinion defendants are entitled, by law, to a summary judgment and that motions by plaintiffs for partial summary judgment on the Statute of Limitations and to assess the value of stock at $180.67 per share are to be denied.

It is, therefore, ORDERED and ADJUDGED by the court that a summary judgment be, and it hereby is, entered in favor of the defendants and against the plaintiffs and this action be, and it is hereby is, dismissed with each party to bear its own costs. There being no reason for delay in entry of this judgment, this judgment for defendants is entered under Rule 54(b), ARCP, and this action be, and it hereby is, dismissed. It is further ORDERED

and ADJUDGED by the court that plaintiffs' motions for partial summary judgment be, and they hereby are, overruled and denied.

DONE and ORDERED this 2nd day of September, 1993.

/s/ Robert M. Parker
Circuit Judge

(2)

No. 95-548

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,
v.
DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where:

(a) a number of plaintiff class members in a class action certified under state rules identical to Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure seek collaterally to attack the settlement of that class action, and

(b) these class members admittedly had contacts with the jurisdiction in which the class action was pending sufficient to have made them joinable as defendants in the action, and

(c) the court in the class action provides a hearing for all members of the class, on first-class mail notice to each class member of the hearing, at which they may appear and put forward any reasons why the class judgment should be set aside or held to be nonbinding, whether based on jurisdictional grounds, procedural due process grounds, or certification under the wrong subsections of Rule 23(b), and

(d) most of the class members make written submissions of their arguments to that court;

is that court's resolution of their procedural due process objections to the class judgment *res judicata* against subsequent collateral attack?

2. May class members who were given first-class-mail notice of a settlement of a class action in a forum which the class members concede had such jurisdiction over them as would have entitled it to join them as defendants, later collaterally attack the settlement judgment for failure to extend them opt-out rights, where the notice of settlement hearing did not expressly offer opt-out rights to class members but (a) the notice did offer class members an opportunity to appear and argue against the form or substance of the settlement, (b) opt-out rights were

available on a discretionary basis under state law to class members who sought to opt out, and (c) the class members did not appear at the settlement hearing, did not object to the form of class certification, and made no requests either for mandatory or discretionary opt-out rights?

PARTIES AND RECORD REFERENCES

The Respondents on whose behalf this brief is filed are Drummond Company, Inc., Drummond Coal Sales, Inc., Elbert A. Drummond, Garry N. Drummond, Joseph E. Nicholls, Jr., Charles W. Adair and the Estate of R. Weaver Self. Neither of the two corporate respondents, Drummond Company, Inc., and Drummond Coal Sales, Inc., has any parent corporation and neither has any subsidiary which has stock outstanding in the hands of the public.

Record references to the Appendices to the brief of Defendants-Appellees (the present Respondents) in the Alabama Supreme Court will be to "Def. Br. App." and to the Appendices to the brief of Plaintiffs-Appellants Martin, *et al.* (now among the Petitioners), in that court will be to "Pf. Br. App.", in each case with the letter or number designation of the particular appendix and, if appropriate, the page thereof. References to pages of the Alabama Circuit Court Clerk's Record are preceded by the letter "C." Deposition transcripts were generally not sequentially page-numbered one after another and in those cases deposition transcripts are cited as "[Deponent name] Tr." and Deposition Exhibits as "[Deponent name] Ex.". References to the Petition for Certiorari filed in this Court are to "Pet." and to its Appendices are to "Pet. App." References to the Appendices to this Brief are to "App."

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On Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BRIEF OF RESPONDENTS IN OPPOSITION

The Respondents, Drummond Company, Inc., and Drummond Coal Sales, Inc. (collectively, "Drummond"), Elbert A. Drummond, Garry N. Drummond, Jr., Joseph E. Nicholls, Jr., Charles W. Adair and the Estate of R. Weaver Self, oppose the grant of certiorari to review the judgment and opinion of the Supreme Court of Alabama in this matter.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Full Faith and Credit Clause, Article IV, § 1, of the United States Constitution, which reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

STATEMENT

The Tender Offer and the Hynson Litigation.—On December 5, 1984, Drummond, the controlling stockholder of Alabama By-Products Corporation ("ABC"), made a Tender Offer to all of the minority shareholders of ABC to acquire any or all of their stock for $75 per share. (Def. Br. App. F at 1) ABC was a publicly-held Delaware corporation whose stock was traded in the over-the-counter market. (Def. Br. App. F at 1, 13) Immediately before the Tender Offer commenced, the bid price for ABC stock was $53.50 per share. (Def. Br. App. F at 14)

The relationship between Drummond and the ABC minority stockholders had been controversial. Various prior efforts by Drummond to acquire the minority interest had been abortive, the most recent being a merger proposed by Drummond in early 1983 at $65 a share. A number of influential Birmingham shareholders of ABC formed a "Stockholders' Protective Committee" ("SPC") to oppose that merger proposal. The SPC circulated to stockholders a report valuing ABC stock at "in excess of $100.00 per share." (Def. Br. App. F at 3-4) ABC's investment banker was unable to render a fairness opinion on the merger proposal and the proposal was terminated. (Def. Br. App. F at 4)

The December 1984 Tender Offer immediately generated controversy also. The SPC quickly issued a circular letter to ABC stockholders reiterating the SPC's valuation of $100 or more and describing the $75 tender price as inadequate. (Def. Br. App. G) Two class actions challenging the Tender Offer were promptly filed by stockholders. One, filed in Federal Court in Birmingham under the Williams Act, was dismissed for lack of standing. The other suit, *Hynson* v. *Drummond Coal Co.* ("*Hynson*"), filed in the Delaware Court of Chancery on January 4, 1985, against Drummond and the directors of ABC, charged them, as controlling stockholder and director fiduciaries, with various breaches of duty. The com-

plaint alleged that the Tender Offer was unfair and coercive and that the Tender Offer Circular was false and misleading. It sought an injunction against the Tender Offer, rescission of it to the extent that it was consummated, an accounting, and damages. (Pf. Br. App. 7)

Tender offers while extended to all stockholders seek individual, not collective, responses by the stockholders. The stockholder response to this one was diverse. Some ABC stockholders tendered none of their shares. Some tendered all of their shares. Others "split" their shares, tendering some and retaining the rest. (Pet. App. 41a-42a) Many of the stockholders were from the Birmingham, Alabama, area; the largest minority stockholder, the Trust Department of Petitioner AmSouth Bank, N.A. ("AmSouth"), made an analysis of the Tender Offer, found that the stock was worth less than the price offered, and after committee action tendered those shares over which it had full discretion. (Goff Tr. 361, 365-66, 489-90) Another large Birmingham bank's trust department reached the opposite conclusion and refused to accept the Tender Offer, except in the case of a few trusts where it permitted the demands of beneficiaries to overrule its judgment. (Roberts Tr. 84, 112-13, 132, 138; Ex. 430)

The Merger and the Neal Case.—No injunction was entered against the Tender Offer, and after extensions, the offer closed in February 1985. As a result of the Tender Offer, Drummond became the owner of a sufficient amount of stock in ABC to give it the power under the Delaware "short form" merger statute to cause ABC to be merged with it without ABC director or other shareholder action. Del. Gen. Corp. Law ("DGCL") § 253, Del. Code Ann. tit. 8, § 253. On August 13, 1985, Drummond caused such a merger, under which the minority stockholders of ABC received $75.60 per share (the $.60 reflected a dividend then due), subject to their individual right to dissent from the merger and demand

an appraisal of the fair market value of their stock in the Delaware Court of Chancery under DGCL § 262. (Lynn Ex. 157) The *Hynson* class plaintiffs amended their complaint to challenge the merger as well as the Tender Offer. (Pf. Br. App. 9 at 20-21)

A substantial amount of the ABC stock did not accept the merger and 189 stockholders, including a number of the AmSouth nondiscretionary trust accounts and many others of the present Petitioners, sought appraisal in the Delaware Chancery Court in a case filed December 3, 1985, styled *Neal* v. *Alabama By-Products Corp.* ("*Neal*"). (Order Amending Judgment in *Neal*, Aug. 21, 1990; C. 104)[1]

The *Hynson* and the *Neal* cases each proceeded in the Delaware court through extensive discovery. Following a hearing on cross-motions for summary judgment before Chancellor Allen in the *Hynson* case in October 1988, efforts were commenced to reach a settlement of *Hynson*. (C. 78; Def. Br. App. I at 1-2) A tentative settlement of the case was finally reached in June 1989, and was documented some months later. (C. 78; Def. Br. App. I at 2) Under the settlement, $5 million was to be paid by or on behalf of the *Hynson* defendants and a class was to be certified to include all the stockholders who tendered in the Tender Offer, all who surrendered their stock in the mergers, and all who sold their stock after the Tender Offer commenced; shares involved in the *Neal* appraisal case were excluded from the class. (Def. Br. App. I at 1-2) The $5 million amounted to about $5 per share, prior to attorneys' fees.

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[1] Mr. Neal, also a Petitioner in this case, had been an officer of ABC, was the largest stockholder of ABC after Drummond and AmSouth, and was a "splitter"; he submitted about half of the approximately 60,000 shares which he and his family owned to be cashed out in the merger and put the remainder in for appraisal in the Chancery Court proceedings. (Neal Tr. 11-13, 21-23, 45-51)

The *Neal* case was tried before a Vice Chancellor in June and July of 1989. The *Neal* petitioners' expert testified to a valuation of $190 a share. The expert for Drummond and ABC testified to a value of $64. The present Petitioners' counsel later well characterized the *Neal* trial as a "swearing match between the experts." (C. 3671) Post-trial briefing was completed by October 1989, and the case stood under advisement for the better part of a year.

Hynson Settled.—In November 1989, Chancellor Allen entered an Order tentatively certifying the *Hynson* class and directing that personal notice of a hearing on the settlement be sent by mail to all class members at their last-known addresses. The class was certified under Delaware Chancery Rules 23(b)(1) and (b)(2), which are textually identical in all material respects to the paragraphs of the Federal Rules of Civil Procedure so numbered. No notice of the availability of opt-out rights was contained in the notice, none being required under those paragraphs, but the Delaware Supreme Court has held that the Court of Chancery has discretion to grant opt-out rights to stockholders in a class action certified under those paragraphs, under which (unlike Rule 23(b)(3) of the Delaware and Federal Rules) opt-out rights are not mandatory, and that this discretion could be exercised even where the notice did not provide for such rights. *Nottingham Partners* v. *Dana,* 564 A.2d 1089, 1101 n.28 (Del. 1989). The notice indicated that there would be a hearing on February 1, 1990, at which consistent with established Delaware practice in class actions any stockholder could appear and object to the settlement or to the class certification. (Def. Br. App. I at 3) The notice warned that an order barring claims against Drummond and the individual defendants relating to the Tender Offer and the subsequent merger would be entered if the court approved the settlement. (*Id.* at 2) A W-9 Form was provided with the notice to be com-

pleted, signed and returned to a Settlement Administrator appointed by the court so that stockholders would not have federal withholding taxes taken out of their settlement moneys. (*Id.* at 3)

No class member whatsoever appeared at the February 1, 1990, settlement hearing before Chancellor Allen to object in any way to the form or substance of the settlement or to seek discretionary opt-out rights. Accordingly Chancellor Allen that day entered a Final Judgment certifying the class, approving the settlement and barring claims by the class members as indicated above. (Def. Br. App. J)

Both before and after the February 1, 1990, Final Judgment, most of the present Petitioners filed their W-9 Forms with the Settlement Administrator. (Pet. App. 42a) Some of the Petitioners and others filed change of address notices with the Settlement Administrator. The Trust Department of AmSouth Bank prior to February 1, 1990, studied the notice of proposed settlement, obtained advice of counsel and committee approval of its participation in the settlement, and filed a vast amount of paperwork to obtain the settlement proceeds for its trust accounts. These included 83 sworn proofs of claim which it drafted itself, although generally speaking sworn proofs of claim were not required except from a narrow subclass not pertinent to AmSouth. (K. Smith Tr. 59-65; Exs. 1598 to 1683)

The Neal Decision and the Alabama Actions.—On August 1, 1990, the Vice Chancellor in the *Neal* case entered his judgment and opinion generally agreeing with the *Neal* petitioners' expert and accordingly valuing the entirety of ABC as of August 13, 1985, under DGCL § 262, at $180.67 per common share. (Pf. Br. App. 12) Many of the present Petitioners continued thereafter to file W-9 Forms with the *Hynson* Settlement Administrator or to write letters to the Administrator inquiring after their settlement proceeds, notwithstanding the immediate

extensive publicity given the August 1, 1990, *Neal* decision in the Birmingham press. *See, e.g.*, Wrinkle Tr. 83-85, 90; Goff Tr. 454-58, Goff Ex. 393.

In January 1991, an action was filed by John H. Martin, a former ABC stockholder ("*Martin*"), in Alabama Circuit Court at Birmingham. The suit sought only damages, compensatory and punitive, but otherwise made essentially the same allegations as had been made in the *Hynson* litigation. The defendants were Drummond and certain of the ABC directors at the time of the Tender Offer. The complaint's theory as to the effect of the *Hynson* Final Judgment was that it was void because the settlement notice did not expressly extend opt-out rights to the class members. (C. 26, 34-35, 43)

Commencing in March 1991, additional plaintiffs, apparently attracted by the $180.67 award in *Neal,* joined in the *Martin* action and in May 1991 two additional lawsuits were filed by other law firms, making allegations similar to those in the *Martin* action (all collectively, the "Alabama Actions").[2] All in all, approximately 500 plaintiffs (including the approximately 100 trust accounts sued for by AmSouth) joined as plaintiffs in the Alabama Actions. These were not, and did not purport to be, class actions. The Respondents denied the material allegations of the complaints and interposed various affirmative defenses, including *res judicata,* release, laches, waiver, accord and satisfaction and the Full Faith and Credit Clause of the United States Constitution. (C. 60, 1803-04)

Proceedings in the Spring of 1991 in Hynson; Chancellor Allen's Decision.—On April 25, 1991, on motion by the defendants under Delaware Chancery Rules 23 and 60(b)(3) in the *Hynson* action, the Delaware Court of Chancery scheduled a hearing to be held on June 7,

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[2] One such action was the "*Durkee*" action, named after its lead plaintiff. (C. 1755) The other was filed on behalf of AmSouth for its trust accounts. (C. 1708)

1991, at which any matter concerning the February 1, 1990, Final Judgment could be raised and heard. (App. 29a-31a) This expressly included the absence of a formal offer of opt-out rights; the propriety of the class certification under Delaware Rules 23(b)(1) and (b)(2); and the consistency of the Final Judgment with the requirements of due process. Individual notice of the hearing and the matters to be considered was given by mail to all class members, including the present Petitioners, on May 2, 1991. (*Id.*)

Responding to that notice, the present Petitioners (apart from AmSouth) through their counsel filed briefs with the Delaware Court of Chancery. The Petitioners in the *Durkee* action filed a 13-page opening statement and later a 4-page statement responding to a brief filed by the Respondents. The Petitioners in the *Martin* action filed a statement consisting essentially of a 30-page brief which they had filed in the Alabama Circuit Court. These submissions were considered by the Delaware Court (App. 26a), although a formal appearance by the Petitioners was not entered, despite a full opportunity to appear.

Following the June 7, 1991, hearing at which counsel for the plaintiff class in *Hynson* and counsel for the Respondents appeared and presented oral argument, Chancellor Allen isued an opinion on June 14, 1991. *Hynson* v. *Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991).[3] The opinion dealt with two principal issues: *First*, did the Delaware court have jurisdiction over the class members sufficient to adjudicate in a binding fashion the dispute tendered to it by the filing of the class Complaint in the *Hynson* case. *Second*, was the class properly certified under Delaware Chancery Rules 23(b)(1) and (b)(2)

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[3] We attach Chancellor Allen's opinion as Appendix A, his Order entered on that opinion as Appendix B, and the Notice of the hearing in question as Appendix C hereto.

and was any formal offer of opt-out rights required under those rules or as a matter of due process.

As to the first issue, the opinion defined the "central question" raised as "whether a single jurisdiction with *in personam* jurisdiction over the corporation and all of its directors may, in a single action, conclusively adjudicate whether a corporation's directors have satisfied their fiduciary duties to the corporation and its shareholders in the context of a corporate merger or other corporate transaction." (App. 3a; footnote omitted) This question was answered "yes." The opinion held that buying stock in a Delaware corporation was a sufficient nexus with that jurisdiction "to render it consistent with traditional notions of fairness to bind the holder of that stock as a plaintiff to adjudications *concerning the corporate rights that attach to that stock,* including the equitable right to require directors to act with loyalty to the corporation and to its shareholders." (App. 19a; emphasis in original) On this basis, citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (App. 12a), the Chancellor found the exercise of jurisdiction over the class to be consistent with the Due Process Clause. The Chancellor's order indicated that other bases of the *Hynson* court's jurisdiction asserted by the Respondents were not being rejected, but that the court chose to rest its decision on the basis stated. (App. 28a)

The Chancellor also analyzed the second question, whether it was consistent with the Due Process Clause and the Delaware Chancery Rules, textually identical in this regard to the Federal Rules of Civil Procedure, that the *Hynson* class had been certified without a formal offer of opt-out rights. Here, the Chancellor cited the cohesive and homogenous nature of the stockholder class. He observed that whatever remedy might be available to the shareholders for the claimed breach of fiduciary duty by the controlling stockholder and the directors, whether injunction, rescission, or money damages, would

"be determined by reference to the effects of the fiduciary's wrong on the trust or on the corporation or all of its stockholders as a class. Remedy in such an action will not entail individual matters [as to particular stockholders]." (App. 12a) The Chancellor observed that there might be available "rescission, payment of 'damages' to raise the price paid to an 'intrinsically fair' price, or constructive trust—but in each case the peculiarities of any holder would have no bearing on the appropriate remedy." (*Id.*) After analysis, and finding that the alleged wrongs done to the class did not have "important individual (not class-based) aspects" (App. 20a), the Chancellor concluded:

> Thus, considering the language of Rule 23 and the requirements of the United States Constitution I conclude that this action was properly certified as a class action under Rule 23(b)(1)(A) and (b)(2).

(*Id.*) The Chancellor thus held, and his order confirmed (App. 27a ¶¶ 2 & 3), that no formal offer of opt-out rights was required under those rules or under the Due Process Clause.[4] No appeal was taken from the Chancellor's opinion and order.

The Alabama Actions Proceed.—Notwithstanding the decision of the Delaware court, the Petitioners chose to continue the Alabama Actions. After extensive discovery, cross-motions for summary judgment were filed, and the Alabama Circuit Court, in an order and opinion dated September 2, 1993, granted the Respondents' motions and dismissed the Alabama Actions. The dismissal was both on the basis of *res judicata* and on the basis that there was no substantial evidence of fraud sufficient to take the case to a jury. (Pet. App. 53a-54a) As to the first point, the court held that the Delaware Chancery Court had jurisdiction over the Petitioners in the *Hynson* case

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[4] Certain claims contained in the Complaint in the *Martin* action that the settlement and/or the court's approval of it had been procured by fraud were dismissed as baseless. (App. 20a-22a)

and that the exercise of that jurisdiction, for reasons similar to those given by Chancellor Allen, did not conflict with this Court's decisions on the requirements of due process in connection with class action litigation. (*Id.* at 53a-54a) Moreover, the court held that if the *Hynson* judgment was not binding on the Petitioners (due to a lack of jurisdiction over them), the Alabama statute of limitations barred the Alabama Actions. (*Id.*)[5]

The Alabama Supreme Court's Decision.—The Petitioners appealed to the Alabama Supreme Court, which unanimously affirmed the judgment of the Circuit Court. The Supreme Court, while expressing appreciation for Chancellor Allen's efforts to resolve the dispute in his June 14, 1991, opinion and subsequent order, did not accept (although it did not reject) his reasoning that the holding of stock in ABC on the part of the class members was by itself a sufficient nexus to provide the Delaware court with jurisdiction to determine disputes as to the rights of all those holders of stock against corporate fiduciaries. (*Id.* at 36a-45a) However, the court held that nonetheless the Final Judgment in *Hynson* was binding upon the Petitioners, inasmuch as the offer of formal opt-out rights spoken of in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985) ("*Shutts*"), was required only "when the plaintiff class members do not have such contracts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant." (Pet. App. 32a) The Court then, summarizing its decision, held that:

> The plaintiffs have such contacts here, consisting of: their ownership of stock in a Delaware corporation; the fact that *Hynson* concerned the value of that stock; and their participation in *Hynson*, indicating submission to the Delaware court's jurisdiction. Furthermore, they received all of the due process components required by *Shutts*—notice, an oppor-

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[5] See n.8, p. 14, below.

> tunity to be heard, the best practicable notice, a description of the action and their rights in it, and adequate representation—lacking only an express right to opt out. The Delaware Supreme Court, however, had provided, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), a discretionary right to opt out even in class actions that did not give an absolute right to opt out, and none of these plaintiffs objected to the failure to give a right to opt out or requested the *Hynson* court to allow them, within its discretion, to opt out. For all these reasons, the plaintiffs should not now be allowed to collaterally attack the *Hynson* judgment.

(*Id.* at 32a-33a)

While unable to say one way or another whether Chancellor Allen's view of the jurisdictional effect of holding stock in a Delaware corporation in a case involving the claims made in *Hynson* was consistent with this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) (Pet. App. 39a-40a), the court held that since most, if not all, of the Petitioners had additional contacts with Delaware, those contacts plus the stock ownership would have been enough to establish Delaware's jurisdiction over them as defendants, and hence, clearly as plaintiff class members. (*Id.* at 40a-42a, 45a-46a) These contacts included participation as Plaintiffs in the *Neal* action—the "splitters" who "purposefully availed themselves of the benefit of the law of Delaware" by invoking the judicial appraisal procedure; the filing of proofs of claim in *Hynson* (primarily AmSouth) which was "significant as showing an intent to submit to the jurisdiction of the *Hynson* court" and the Petitioners' almost universal submission of W-9 forms, which "expressed an interest in receiving proceeds from the *Hynson* settlement." (Id. at 42a) The court noted that instead of requesting discretionary exclusion from the class under the *Nottingham Partners* case, most of the Petitioners "affirmatively indicated their willingness to participate in the *Hynson* settlement." (*Id.* at 44a) The court

held that the procedures in the Delaware court did not fall so far short of insuring the protection of the interests of the absent class members as to make it unnecessary for them to request in the Delaware court that they be excluded from the action. (*Id.*) The court, in conclusion, observed that the Petitioners who had "sufficient contacts with Delaware in connection with the *Hynson* proceedings", meaning contacts in addition to stock ownership, "are barred from relitigating the claims settled in *Hynson*." (*Id.* at 45a)

The court observed that "[t]his answers the claims of most of the plaintiffs, and it may answer the claims of all plaintiffs." (*Id.* at 45a-46a) The court considered remanding the case "for individualized findings as to any plaintiffs who may not have established any contacts with Delaware other than the holding of ABC stock"; but the court rejected this approach, noting that "constitutional rights may be waived if not timely asserted." (*Id.* at 46a) The court held that a waiver had occurred in view of the notice that all class members received of the proposed binding settlement; the existence of colorable jurisdiction over the absent class members, given their stockholdings in ABC; the availability of discretionary opt-out rights under *Nottingham Partners* for Rule 23(b)(1) and (b)(2) classes in Delaware; and the absence of any objection by any class member to the settlement or any expressed interest on their part in exclusion until long after the settlement. Accordingly, under the doctrine of waiver, the court held that any Petitioner in that category was barred as well. (*Id.* at 48a)[6] Before this Court, the Petitioners all take the position that indeed they did have sufficient contacts with the State of Delaware to have

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[6] The Respondents had urged the doctrines of waiver and laches to the Alabama Supreme Court as one of a number of grounds of affirmance. (Def. Br. 135-37)

permitted its courts to exercise jurisdiction over them as defendants.[7]

REASONS FOR DENYING THE WRIT

The Petitioners have all accepted the determination of the Alabama Supreme Court to the effect that they had sufficient contacts with the State of Delaware under the doctrine of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) ("*International Shoe*"), so that they could have been made *defendants* in the *Hynson* case in the Delaware courts. Nonetheless, Petitioners claim that the judgment of the Delaware court in the *Hynson* case is void as to each of them because they were not given a formal opportunity to "opt out" of the case at the time that it was in the process of settlement. They claim that procedural due process ensures their right to "opt out" even though the Delaware court had jurisdiction over them. They accordingly claim the right to pursue the Alabama Actions commenced six years after the alleged wrongs to them.[8]

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[7] The Alabama Supreme Court did not discuss the Circuit Court's alternative ground for granting summary judgment, the absence of any evidence of fraud sufficient to go to a jury.

[8] The Petitioners had a statute of limitations problem in the Alabama courts. See n.5, p. 11 above and Pet. App. 53a. The pertinent statute of limitations was two years. Ala. Code § 6-2-38(l) (Supp. 1990). While alleging nonaccrual through fraudulent concealment, they were unable to effectively show nonaccrual through such concealment since their claims included claims that the Tender Offer Circular was coercive, and coercion concealed from its victim is hardly coercive; and as to the alleged "fraud", the SPC immediately called to the attention of stockholders most of what was later claimed to be fraud, the expert evidence of valuation relied on by the Petitioners in the *Neal* case was made known to a number of the Petitioners years before the present action, and the 1985 complaint in the *Hynson* case itself made allegations similar to those later made in the Alabama Actions in 1991. Thus, the pendency of the *Hynson* action had to be relied on in order to allege a tolling of the statute of limitations. But under Alabama law only proceedings in a court with jurisdiction can toll the stat-

Petitioners claim this right although the Delaware court, which admittedly had jurisdiction over them—jurisdiction based on contacts extensive enough so that they could have been made defendants (Pet. App. 32a)—twice gave them, by first-class mail, notice of hearings at which they could have asserted (and in one case did assert) the same rights to opt out that they now urge before this Court that they were denied.

The first of these notices, given in November 1989, was for a hearing on February 1, 1990, at which objections to the form of class certification—without formal opt-out rights, under Rule 23(b)(1) and Rule 23(b)(2)—could have been made, and where requests for opt-out rights under the *Nottingham Partners*[9] case would have been entertained. The Petitioners, apparently satisfied with the settlement, and being occupied then and thereafter in filing proofs of claim and W-9 Forms with the Settlement Administrator and in otherwise trying to get their *Hynson* settlement moneys, made no objection at all and did not seek to participate in the hearing.

The second notice, given on May 2, 1991, was for a hearing before the Delaware court on June 7, 1991. That hearing was to determine, among other things, whether the class certification without opt-out rights effected sixteen months before had been consistent with procedural due process. (App. 29a-31a) Full participation at the hearing to the same extent as if a named

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ute of limitations. *See, e.g., Freer* v. *Potter*, 413 So.2d 1079, 1082 (Ala. 1982). The Petitioners accordingly made concessions below as to the existence of jurisdiction in the *Hynson* court, after at first having denied its jurisdiction. Apparently since these concessions may not have been as clear as those now made, the Alabama Supreme Court did not rely on them in its opinion, finding, in addition to the holding of stock in a Delaware corporation, other contacts with Delaware sufficient to support jurisdiction over the Petitioners under *International Shoe* if they had been defendants. (Pet. App. 32a)

[9] See the discussion at pages 5, 13, above.

party to the case was made available to each class member. The Petitioners received this notice and all of them, except AmSouth, through their counsel furnished briefs to the Delaware court to assist it in resolving the issues which the hearing had been called to determine. The Delaware court determined both (a) that it had jurisdiction, consistent with territorial due process, over the Petitioners in the *Hynson* case [10] and (b) that their procedural due process rights were not violated by the failure expressly to offer opt-out rights in the notice of the February 1, 1990, settlement hearing. That decision was not appealed and is *res judicata.* It is accordingly inappropriate to treat this case as one in which any alleged conflict between the circuits as to the meaning of *Shutts* can be resolved. The availability of discretionary opt-out rights in this case, and the failure of the Petitioners to seek them, also makes it inappropriate to treat this case as one in which the resolution of any alleged conflict of the circuits could be effected.

Accordingly, the conflict of circuits tendered by the Petitioners could not appropriately be resolved in this case, even assuming that it existed.

In fact, that conflict does not exist. There is an extensive line of cases treating this Court's decision in *Shutts* as viewing opt-out rights as a method of establishing jurisdiction over plaintiff class members. The Ninth Circuit's opinion in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994) ("*Ticor*"), the one allegedly contrary case cited by the Petitioners, does not enunciate the proposition ascribed to it by Petitioners. The result below is also supported by the clear correctness of the numerous decisions taking the opposite view from the view of the Petitioners and the view which they ascribe to the Ninth Circuit's decision in *Ticor*. Finally, the alleged procedural embarrassments, said by Petitioners to be caused by the rule set forth in

[10] A conclusion now accepted by Petitioners.

the decision below and decisions by three Federal Courts of Appeals, are nonexistent.

1. *The Issue Tendered by Petitioners Is Itself Barred by Res Judicata.*—It is black-letter law that the jurisdiction of a court to hold proceedings validly affecting a person's rights against his or her will is dependent on the existence of three factors: (1) the presence of sufficient contacts between the jurisdiction which established the court and that person; (2) the giving of fair notice of the proceedings to that person; and (3) the provision to that person of a right to appear and be heard at the proceeding. *Restatement (Second) of Conflict of Laws* ("*Restatement*") §§ 92(a) and (b) (1971).[11] Factor (1) was found to exist by the Alabama Supreme Court and the Petitioners all concede it here. There is no dispute that the Petitioners received first-class mail notice of both the February 1, 1990, and June 7, 1991, hearings in the Delaware Chancery Court, and that each of them had an opportunity to appear and be heard at each of those hearings (and, although hardly necessary, that most of the Petitioners took advantage of that opportunity with respect to the June 7, 1991, hearing by filing substantial briefs). It could be argued that the outcome of the February 1, 1990, hearing, given the existence of the three jurisdictional factors, is conclusive on the Petitioners' rights. But certainly the actual, considered, and express adjudication in June 1991 by Chancellor Allen not only of the court's jurisdiction, but also of the issue whether the Petitioners' procedural due process rights had been violated, is conclusive on the Petitioners.[12]

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[11] Subsections (a) and (b) of § 92 relate to jurisdiction over the person; subsections (c) and (d) to "subject matter" jurisdiction, never in issue in this case. The other black-letter side of the coin is found in § 104: "A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states."

[12] See the discussion at pages 9-10, above, and App. 20a for the Delaware court's express resolution of this issue.

The Petitioners say that this Court's decision in the *Shutts* case as to the necessity of granting opt-out rights in certain class action cases does not turn on the extension of those rights as being a method of obtaining jurisdiction—although the *Shutts* opinion uses the word "jurisdiction" in this context 19 times—but that it is a requirement of procedural due process even in the presence of jurisdiction. They say, in effect, that the Delaware court would have to have afforded the class members an opt-out right if they were all residents of Wilmington and lived within walking distance of the courthouse. But the Delaware court decided differently at the June 1991 hearing. Given the existence of jurisdiction, given the first-class mail notice to all the class members, and given their fair opportunity to be heard before it as parties on the issues—even putting to one side the fact that all but one of the Petitioners filed substantial briefs with the Delaware court—the Delaware court's resolution in June 1991 of the issue of whether the failure to grant formal opt-out rights in its February 1, 1990, order violated procedural due process is conclusive, right or wrong. It is *res judicata* and entitled to full faith and credit in the Alabama proceedings.[13] The fact that the Petitioners never entered a formal appearance in the Delaware court (Pet. 4) is irrelevant; the court had jurisdiction over them and gave them notice and the right and opportunity to be heard.

Once a court with jurisdiction over parties has expressly adjudicated a matter concerning their rights, even constitutional rights, the matter is *res judicata* and cannot be collaterally examined. The Full Faith and Credit Clause demands that in a case, such as this, involving state courts. *Riley* v. *New York Trust Co.*, 315 U.S.

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[13] Chancellor Allen thus resolved the contention underlying the Petitioners' arguments, namely, that *Shutts* required, as a matter of procedural due process, opt-out rights in the *Hynson* case. He held "no."

343, 348-49 (1942); *Durffee* v. *Duke*, 375 U.S. 106, 109 (1963); *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982); *Restatement* § 93 (1988 Revisions). State courts as well as federal courts have the power to determine whether federal Constitutional rights have been infringed, and at least in civil cases their determinations, assuming jurisdiction over the parties, are conclusive, subject only to direct review by this Court; those determinations may not be attacked collaterally. *See Angel* v. *Bullington*, 330 U.S. 183, 188-90 (1947); *Montana* v. *United States*, 440 U.S. 147, 156-58 (1979). An assertion of error by the rendering court is not a basis for collateral attack. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 709 n.16; *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940); *Restatement* § 106.

Given the admitted jurisdiction of the Delaware court over the Petitioners—jurisdiction sufficient even to join and bind them as defendants—the Delaware court's adjudication of whether its earlier order violated their procedural rights under the Due Process Clause must be binding on them, right or wrong. Their appropriate, and only forum accordingly for the argument of "opt-out rights as procedural due process" which they now try to bring before this Court was to appear in June 1991 in the Delaware Chancery Court, appeal to the Delaware Supreme Court,[14] and, if dissatisfied with the result there, seek this Court's direct review.[15]

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[14] A class member has such a right of appeal in Delaware. *See e.g., Polk* v. *Good*, 507 A.2d 531, 533 (Del. 1986); *Pinkert* v. *Wion*, 431 A.2d 1269, 1270 (Del. 1981).

[15] Petitioners claim that this case does not present the circumstances that caused this Court to dismiss the petition for certiorari in *Ticor*. (Pet. 8-10) In fact, it presents more compelling circumstances. In *Ticor*, *res judicata* precluded the Court from having before it a preliminary issue which might have affected the grounds of the Court's decision; the majority of the Court thus declined to answer what was held to be a potentially hypothetical Constitu-

2. *Additional Grounds Prevent Review of the Issue Tendered by the Petitioners.*—The Petitioners do not contest the holding of the Alabama Supreme Court that under Delaware law, if any of the Petitioners had chosen to show up at the February 1, 1990, hearing and to request to opt out of the settlement, the Delaware Court of Chancery had the power and discretion to grant that request under *Nottingham Partners*. This factor in and of itself, given the admitted existence of jurisdiction in the Delaware court, and given the fact that the Petitioners instead of considering how to distance themselves from the *Hynson* settlement were then actively engaged in trying to claim the benefits of it, negates any contention of violation of procedural due process in any way other than as an abstraction. Moreover, as the Alabama Supreme Court held, again in a ruling not challenged in this Court, a constitutional right, even if existent, can be waived (Pet. App. 46a); and by their failure both to object to the form of class certification at the February 1, 1990, hearing and to request discretionary opt-out rights there, and by seeking to obtain the fruits of the *Hynson* settlement, the Petitioners waived any rights which they might have had. (*Id.* at 47a-48a) These holdings of the Alabama Supreme Court, not challenged in the Petition, stand as blocks to the consideration of the abstract issue tendered by the Petitioners.

3. *The Asserted Conflict of Circuits Does Not Exist.*—Petitioners claim that there is a conflict of circuits. They urge that the Ninth Circuit, in *Ticor*, held that in certain class action cases, a class member may collaterally attack a class judgment or settlement even if he or she was subject to the personal jurisdiction of the class court as if a defendant under *International Shoe* if opt-out rights are not provided, while the Second, Third and Eighth Cir-

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tional question. *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1360 (1994). Here *res judicata* prevents the Court from reaching the tendered issue at all.

cuits hold to the contrary. *In re Drexell Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *White* v. *National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). But while the Petitioners are correct as to the positions of the Second, Third and Eighth Circuits, they are not correct as to the position of the Ninth Circuit. The Ninth Circuit opinion in *Ticor* may be read from beginning to end without encountering any observation by the court that the parties seeking collaterally to attack the judgment rendered by the District Court in Philadelphia were subject to the jurisdiction of that court under *International Shoe* principles, or any discussion of the implications of the existence of such jurisdiction.

Thus, as the briefs in this Court in *Ticor* demonstrate, it is impossible to say whether the "due process" referred to in the *Ticor* court's opinion (982 F.2d at 391) had to do with the limits on exercise of judicial jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment [16] or with the procedural protections afforded by that Clause.[17] Indeed, the argument of the prevailing party in the Ninth Circuit in *Ticor* was, in fact, based clearly and squarely on *territorial* due process:

> The Supreme Court has found that an opportunity to opt out is *constitutionally* required to obtain personal jurisdiction over absent class members from outside the forum state in the context of claims for

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[16] The main federally-enforced limitation on the territorial jurisdiction of State courts is the Due Process Clause. See *International Shoe*, 326 U.S. at 316-17.

[17] Counsel were in disagreement on the issue as to what the Ninth Circuit meant, and sometimes proceeded to argue on both assumptions. Petition for Certiorari, filed June 15, 1993, No. 92-1988, at 9-10; Brief for Petitioners, filed Nov. 16, 1993, at 11 (both assumptions), 17 (territorial); Brief for Respondents, filed Dec. 13, 1993, at 6-7.

> monetary damages . . . . In addition, plaintiffs' [the parties writing the brief] argument only applies with regard to class members from outside the forum state, over whom the court has no personal jurisdiction other than through the effect of class certification. Where personal jurisdiction is otherwise properly asserted by the Court, the Supreme Court's holding in *Shutts* is irrelevant.

Reply Brief for Plaintiffs-Appellants, *Brown* v. *Ticor Title Insurance Co.*, 9th Cir., No. 91-15474, filed October 1991, at 3-4 (emphasis in original). One must presume that the court accepted the argument that prevailing counsel made, not a broader argument that he chose not to make. Indeed, in this Court, the parties defending the Ninth Circuit's holding in *Ticor* pointed out without contradiction that their clients never received notice of the class action or its settlement—and a failure to give notice would negate jurisdiction—and the issue of the territorial jurisdiction of the rendering court was also a subject of argument.[18]

The Ninth Circuit's opinion in *Ticor*, accordingly, cannot be read as establishing any precedent contrary to the

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[18] For the failure to give notice, see Brief of Respondents in Opposition to Certiorari, filed July 19, 1993, No. 92-1988, at 6 ("he [the absent plaintiff] received no notice of the lawsuit . . . did not know who the lawyers were, and was not told about the settlement.").

The court rendering the judgment attacked in *Ticor* was a federal court and while Congress could give all federal courts general jurisdiction running throughout the United States, with some exceptions it never has. Generally speaking, the territorial jurisdiction of the federal courts is confined to that of the respective states in which they sit. *See* Fed. R. Civ. P. 4(e). A question argued in *Ticor* was the extent to which the nationwide service on defendants available in antitrust cases (as *Ticor* was), afforded jurisdiction over out-of-state class members and whether the limitation on jurisdiction applied to involuntary plaintiffs as well as defendants. Petition for Certiorari filed June 15, 1993, No. 92-1988, at 20-22; Brief for Petitioners, filed Nov. 16, 1993, at 12-16.

consistent holdings of the other Courts of Appeals which have expressly held that contacts sufficient to support personal jurisdiction under the *International Shoe* doctrine obviate the need to offer opt-out rights as a matter of constitutional law, although, to be sure, opt-out rights must be granted wherever the Federal Rules (or similar rules under state law) provide for them, as in a case under Rule 23(b)(3). *See Ticor*, 114 S. Ct. at 1361.

The decisions of the Second, Third and Eighth Circuits are, in any event, clearly correct and do not contradict this Court's ruling in *Shutts*. This Court used the word "jurisdiction" 19 times in its opinion in *Shutts* to identify the particular aspect of due process—the requirement of territorial or jurisdictional due process described in *International Shoe*—that was before the Court. The class members in *Shutts* lived in all 50 States and abroad and only a few had any connections with Kansas (472 U.S. at 799, 801, 814-15), the state in whose courts the judgment in question had been rendered. This Court identified the petitioners' claim in *Shutts* as being one that

> Kansas courts *may exercise jurisdiction* over these plaintiffs *only if the plaintiffs possess the sufficient "minimum contacts"* with Kansas as that term is used in cases involving personal jurisdiction ove out-of-state defendants. [Citing *International Shoe* and other cases.] Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its *jurisdictional reach* and thereby violated the due process rights of the absent plaintiffs.

Id. at 806 (emphasis supplied).

This Court held that offering an option to opt out of a class, at least in certain cases, was all that was required in order to obtain jurisdiction over the plaintiff class members who did not otherwise have sufficient contacts with the state or had affirmatively consented to its jurisdiction, given the difference in interests between adjudicating the

rights of a defendant and of a potential plaintiff.[19] *Id.* at 807-12. In cases where jurisdiction is supported on some other basis, opt-out rights are not constitutionally required, although they are required in the interests of procedural fairness, by rule in the Federal Rules and in the great majority of state rules which follow them, in actions of the sort described in Rule 23(b)(3) where the interests of the class members may not be cohesive. *Id.* at 813 n.5.

Once the threefold requirements for the exercise of judicial jurisdiction over a defendant—sufficient contacts, notice, and an opportunity to be heard—are present, a defendant in a civil case would have no Constitutional rights to "opt out" because he would prefer to be sued in another forum. Similarly, the Federal Rules have long contemplated that persons "whose joinder will not deprive the court of jurisdiction over the subject matter" and who are "subject to service of process" by the court may be joined, despite their refusal to participate in an action, as "involuntary plaintiffs"; no provision for opt-out rights for these analogs of absent class members is made. Fed. R. Civ. P. 19(a) (first adopted in substantially its present form effective July 1, 1966). To accept the more expansive view ascribed (without basis) to the Ninth Circuit by the Petitioners, that class members who are subject to a court's jurisdiction based on the existence of sufficient contacts under *International Shoe* and who have received notice of and been afforded an opportunity to participate in a proceeding, but do not deign to do so, may later collaterally attack the result of that proceeding if they don't like it, is to weaken the necessary finality of judicial proceedings and to lead to more cases like the present one, in which the present Petition-

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[19] The issue of "procedural" rather than "territorial" due process was not raised below in *Shutts*, *see* 472 U.S. at 802, and hence was not before this Court.

ers approach this Court close to eleven years after the alleged wrongs of which they complain.

4. *The Parade of Horribles Envisioned by the Petitioners Will Not Take Place.*—The Petitioners claim that if this Court does not adopt a rule that class members having sufficient contacts with a jurisdiction rendering a class judgment, who have been afforded personal notice and an opportunity to participate, may nonetheless later attack the proceedings collaterally, it may be necessary at "the commencement of any class action" to have "discovery on an individual basis . . . to determine which of potentially hundreds or thousands of absent class members have minimum contacts with the forum." (Pet. 13) Why this would be so is not explained. Nor is it explained why this phenomenon of widespread *in limine* discovery of class members for their contacts with the forum has not been seen in class actions in the Second, Third and Eighth Circuits, where a rule contrary to that which the Petitioners advocate to this Court has been the law for several years. The question of jurisdiction in the rendering court is one which is habitually taken up, and must be taken up, when a collateral attack is later mounted; the subject of *International Shoe* contacts by each class member is never taken up "at the commencement of any class action," and there is no need to do so.

As to the practical importance of the tendered issue, we note that the present case is unusual in that there was a determination by the court in the forum where the collateral attack was mounted that all 500 of the plaintiffs had, or were likely to have had, sufficient contacts with the rendering court so that they could have been joined as defendants there. This was followed by the acceptance of that determination by all 500 of the parties who were attempting the collateral attack. But in the usual case of a large class, such as a consumer product tort case, a nationwide price-fixing case, or the like, it may be expected that most class members will have no *Inter-*

national Shoe-type contacts with the jurisdiction in which the class court sits. In all cases of certification of class actions, it is in the interest of the class representatives, and, at least where a settlement is negotiated, it is in the interest of the defendants, to see to it that the determination or judgment entered on settlement is as broadly binding on the class as possible. *See Shutts*, 472 U.S. at 805-06. Thus, as a practical matter, the issue raised by the Petitioners, even if it was a live one, is not of great practical importance; at least one side in the original class action, and possibly both sides, would have an interest in following such procedures as would validly bind to the result, against collateral attack, not only those class members who might have *International Shoe* contacts with the forum but those who do not.

To say that a rule which diminishes the category of class members who may bring a collateral attack on class action judgments "will inevitably lead to uncertainty in class settlements" and prevent "finality" (Pet. 13) is to turn matters on their heads. A rule which encourages class members dissatisfied with a class settlement or with their class counsel to come forward and object in the class court, to seek opt-out rights there if not expressly afforded, and to take a direct appeal if they believe their rights under the Constitution, pertinent statutes, and court rules have been infringed, is a rule that reduces "uncertainty" and produces "finality." That rule is the rule of the Second, Third and Eighth Circuits and of the court below.

Most of the cases which have allowed class settlements to be set aside or which have ordered the provision of opt-out rights not initially provided for involve direct applications in the class court and if necessary appeals from its judgment. That procedure is available in Delaware, *see Nottingham Partners*, 564 A.2d at 1093-94; in New York, *see In the Matter of Colt Industries Shareholder Litigation*, 566 N.E.2d 1160, 1161-63 (N.Y. 1991); and in the fed-

eral courts and in other state jurisdictions. *See e.g., Jefferson* v. *H.K. Porter Co.*, 485 F. Supp. 356, 357- 58 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir 1981); *In re Kroger Co. Shareholder Litigation*, 590 N.E.2d 391, 394-95 (Ohio App. 1st Dist. 1990). The rule tendered by Petitioners to the contrary expands collateral attack and encourages the taking of multiple bites at the apple. The Petitioners' rule is one which enlarges the category of class members who can collaterally attack a class judgment, which will promote uncertainty, prevent finality, and lead to efforts, like the present one, which seeks to permit the Petitioners who were admittedly subject to the jurisdiction of the Delaware courts to relitigate a case filed in those courts close to eleven years ago.

* * * *

There is no conflict of holdings in the Circuits and the rule concerning the effect of the existence of "jurisdiction as over a defendant" identified by Petitioners as the majority rule is in fact the general rule and is correct. The decision below is in accordance with that rule. But no issue as to that rule's correctness is presented by this case, given the *res judicata* effect that must be afforded Chancellor Allen's resolution at the June 1991 hearing of the procedural due process issues now raised by the Petitioners, and the other factors discussed above.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1995

APPENDIX A

Chancellor Allen's Opinion of June 14, 1991, in *Hynson*

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 7904

RICHARD HYNSON, JR., *et al.*,
Plaintiffs,

v.

DRUMMOND COAL COMPANY, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Date Submitted: June 7, 1991

Date Decided: June 14, 1991

ALLEN, Chancellor

Defendants in this stockholders' class action have moved, pursuant to Rule 60(b)(3) and Rule 23, for an order confirming (1) that they are guilty of no fraud or deception that taints the final judgment in this matter entered on February 1, 1990, and (2) that this case was properly certified as a class action under Rule 23(b)(1)

and (2). Two factors occasion this motion. First, the certification of this action as a class action under Rule 23(b)(1) and (2) was stipulated by the parties and, after notice and hearing, the court entered the stipulated order without addressing in writing the question whether it was constitutionally permissible, in the circumstances, to bind absent class members to a final judgment without affording them the opportunity to opt-out of the action. The second factor occasioning the motion is the filing by certain class members in the Circuit Court of Jefferson County, Alabama of civil actions against the defendants herein charging them with the same wrongs as those apparently settled and discharged by the final judgment in this case. The apparent premises of those actions are the assertions (1) that, in the absence of an opt-out opportunity, the Alabama plaintiffs are not bound by the final judgment in this class action because there existed, they say, no minimal contact among themselves, the litigation and this jurisdiction that would satisfy traditional notions of fair play and substantial justice and (2) that defendants were guilty of fraud in this action (explained below) that eviscerates the effectiveness of the judgment.

The defendants claim here, and in these newly filed Alabama actions, that this court's final judgment is valid and binding on all members of the class. That final judgment is, they say, entitled to full faith and credit, and as such is a complete bar to any further liability arising from the tender offer-merger transaction from which this case and the Alabama litigation arise. Whether defendants' assertion is sound or not is ultimately a question of federal law that is to be answered in the first instance by the courts of the State of Alabama. But these claims cast a shadow upon this court's processes and since neither of these matters has been addressed in writing by this court, and since it may be helpful to later courts to have this court's view, I take up this procedurally unusual motion.

The central question raised by this motion is of general importance. It is whether a single jurisdiction with *in personam* jurisdiction over the corporation and all of its directors may, in a single action, conclusively adjudicate [1] whether a corporation's directors have satisfied their fiduciary duties to the corporation and its shareholders in the context of a corporate merger or other corporate transaction. *See Nottingham Partners v. Dana,* Del. Supr., 564 A.2d 1089 (1989); *In the Matter of Colt Indus. Shareholders' Litig.,* 77 N.Y.2d 185 (1991).

This question was left unanswered by the Supreme Court of the United States in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). In *Shutts* the Supreme Court held that, so long as class members are afforded an opportunity to "opt-out" of the action, the due process clause does not require that all members of a plaintiff class have such "minimal contacts" with the forum jurisdiction as would sustain *in personam* jurisdiction over each class member under the analysis of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). *See Shutts,* 472 U.S. at 812. The court noted its holding was "limited to those class actions concerning claims wholly or predominately for money judgments. We [the Supreme Court] intimate no view concerning other types of actions, such as those seeking equitable relief." *Shutts,* 472 U.S. at 811 n.3.

In this action, absent plaintiff class members were afforded no right to opt-out. This case therefore raises the question that the presence of such a right eliminated in *Shutts*: whether, in order to be preclusively bound by a judgment in a properly conducted Rule 23(b)(1) or (b)(2) action (in which no opt-out option is provided), a member of the class must have a sufficient nexus with

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[1] By that phrase I mean (here and elsewhere in this opinion) an adjudication that binds the corporation and all of its shareholders.

the rendering jurisdiction as to make permissible exercise of *in personam* jurisdiction over that person, with respect to the claims in issue? The question as it arises here is, of course, not so general as that. This case involves a particular class of litigation: stockholder action against corporate fiduciaries. That fact supplies important context for addressing the subsidiary question: whether ownership of corporate stock itself constitutes such a relationship with the corporate domiciliary jurisdiction that it is fair to subject the holder of stock to that jurisdiction for the purpose of adjudicating the existence or contours of corporate rights that attach to stock ownership.

For the reasons set forth below, considerations both of efficiency and fairness in our federal system, in my opinion, require that a single adjudication be available in which charges of breach of a director's or controlling shareholder's duty to a corporation and its shareholders may be conclusively determined and all holders of stock bound. It is further my view, as explained below, that where the issue is whether a plaintiff class may be bound to an adjudication of the equitable duty of loyalty created by the law of the incorporating state, that the purchase (or merely holding) of the shares of a corporation of that state itself creates a sufficient relationship with that jurisdiction to permit that jurisdiction to be one in which rights attaching to stock of the corporation may be conclusively adjudicated.

I.

Procedural Background of the Present Motions

This stockholders' class action challenged the propriety of a two-step transaction in which Drummond Coal Company, Inc., ("Drummond") then the majority shareholder of Alabama By-Products, Corp., a Delaware corporation, ("ABC") acquired (through a subsidiary) all of the common stock of ABC. The first leg of this transaction was a December 5, 1984 cash tender offer extended

by the subsidiary for up to all of the publicly held ABC shares at $75 per share. The concluding step was an August 1985 cash-out merger at the same $75 per share price, eliminating those shares that had not been previously tendered. At the time of the first of these transactions, Drummond owned, directly and indirectly, approximately 68% of ABC's Class A common stock—the only class of ABC's stock with voting power—and about 45% of ABC's equity.

This action was filed on January 4, 1985. Plaintiff was a holder of Class A and Class B Common Stock. He asserted a class action on behalf of himself and all owners of ABC Common Stock. Defendants were Drummond, its subsidiary that had actually extended the offer, and all of ABC's directors.

The complaint alleged that Drummond, the controlling shareholder, violated the fiduciary duty it owed to the ABC stockholders by structuring a coercive tender offer and issuing a false and misleading offering circular and that the ABC directors had breached their fiduciary duties to the ABC stockholders by causing ABC (i) not to oppose the tender offer, taking instead a neutral position, and (ii) to otherwise fail to protect the interests of ABC's stockholders. The complaint sought to enjoin the tender offer and/or rescind the tender offer. Plaintiff also sought an accounting, and compensatory and/or rescissory damages.[2]

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[2] No other suit was filed in any court challenging the tender offer, except one filed in the United States District Court for the Northern District of Alabama on December 21, 1984, under the style of *Turner v. Drummond Coal Co.* That suit was filed by certain non-tendering stockholders of ABC and pleaded an alleged violation of Section 14(e) of the Securities Exchange Act of 1934. On September 17, 1985, the District Court granted defendants' motion to dismiss on the grounds that non-tendering stockholders had no standing to sue under Section 14(e). No appeal was prosecuted.

No motion for preliminary injunction was presented. Upon the closing of the tender offer Drummond's direct and indirect ownership of ABC was increased to over 90% of each class of ABC stock.

On August 13, 1985, ABC was merged into a Delaware subsidiary of Drummond under 8 *Del. C.* § 253. The shares of ABC common stock not then owned by Drummond or its subsidiary were in the merger converted into the right to receive $75.60 per share in cash, subject to the rights of dissent and appraisal set forth in 8 *Del. C.* § 262.

On December 3, 1985, certain shareholders of ABC who had neither tendered their shares nor voted for the merger instituted a judicial appraisal of the fair value of their stock in this court. *See Neal v. Alabama By-Products Corp.*, Del. Ch., C.A. No. 8282, Chandler, V.C. (Aug. 1, 1990).

Thereafter, the complaint in this action was amended on February 21, 1985, and again on September 11, 1986, after the consummation of the merger. As amended through the Second Amended Complaint, the action presented essentially the same structure as that of the original complaint. Additional details of the alleged breaches of fiduciary duty were pleaded; a second named plaintiff was added; the merger was mentioned; and an allegation was made that the meeting of the board of directors of ABC that considered ABC's position with respect to the tender offer was invalidly called and held. Rescission of the tender offer and merger was sought, together with an accounting and damages. The class alleged was identical to that of the original complaint, and the gravamen of the amended complaint was still the alleged breach of fiduciary duty by the individual defendants constituting the board of ABC and by Drummond as controlling shareholder of ABC. A motion for class certification under Rule 23(b)(2) was filed on January 21, 1987, but not brought on at that time.

Extensive discovery was taken, including document production, depositions of each of the individual defendants, and depositions of representatives of Drummond's investment advisers. On May 28, 1987, defendants moved for summary judgment. On January 13, 1988, plaintiffs cross-moved for partial summary judgment based on the claim that the individual defendants failed to exercise due care in their consideration and proposal of the tender offer. These motions were under consideration when an agreement in principle of settlement was reached in June 1989.

The *Neal* appraisal action was tried in this court from June 17, 1989, through July 7, 1989. Post-trial briefing of the appraisal action was completed on October 20, 1989. The trial, as well as the post-trial briefs, were open and available to the general public. Certain, but not all, of the pretrial discovery had been conducted under a confidentiality order.

* * *

While the motions for summary judgment in this action were pending, the attorneys for the class plaintiffs and the attorneys for the defendants, at the court's suggestion, engaged in settlement discussions. These discussions commenced in late 1988 and early 1989, but no settlement was reached. Subsequently, in June 1989, these negotiations were resumed and an agreement in principle to resolve the action was reached. The agreement was not formalized until November 1989.

On November 3, 1989, a Stipulation and Agreement of Compromise and Settlement was submitted to the court in this action. The settlement provided that the action be certified as a class action pursuant to Chancery Rules 23(a), 23(b)(1) and 23(b)(2). The class members included, in the aggregate, all those stockholders of ABC who had been such on December 5, 1984, the day the tender offer was made, except (i) the defendants and

(ii) those stockholders who had elected to join in the *Neal* appraisal action.

The settlement required defendants to pay the sum of five million dollars or $5 per share (approximately) to be held in escrow with interest for the benefit of the class. Prior to completing distribution of the settlement fund to the class, certain expenses of settlement administration and such fees and expenses as the court allowed to plaintiffs' attorney were to be deducted from the fund, and the exact number of shares in the class was to be determined.

The settlement contemplated, and the court ordered on November 28, 1989, pursuant to Rules 23(a), 23(b)(1) and 23(b)(2), that this action was to be settled as a class action and that the class consisted of all former stockholders of ABC (i) who tendered their shares in response to the tender offer, (ii) who held shares on December 5, 1984, and sold them prior to August 13, 1985, and/or (iii) whose shares were converted by the merger into the right to receive $75.60 per share in cash, excepting in each case (a) the named defendants, their immediate families and/or entities controlled by the defendants, and (b) persons who were entitled to a statutory appraisal of their ABC stock or who settled their appraisal claim ("the class").

Notice was duly mailed to all members of the class on or about November 29, 1989, informing them of the terms of the proposed settlement and of their right to appear at a hearing to object to the certification of the class or to the terms of the settlement.

The notice advised members of the class that:

> [a]ny member of the Class who objects to the certification of the Class, the Stipulation, the Settlement, the judgments with respect thereto, and/or the award of attorneys' fees and expenses to plaintiffs' counsel, or who otherwise wishes to be heard, may appear in

> person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant . . . .
>
> Any person who fails to object in the manner prescribed above shall be deemed to have waived such objection and shall be forever barred from raising such objection in this or any other action or proceeding.

The notice also made plain that at the hearing "if the settlement is not approved, the class action determination will be vacated." The members of the class were advised that in order to avoid a 20% withholding tax imposed by federal law on persons who are subject to "backup withholding," an IRS form W-9 would have to be executed and returned to the Settlement Administrator. A high proportion of stockholders returned W-9 forms.

On February 1, 1990, the hearing was held to determine whether the maintenance of this action as a class action under Rules 23(a), 23(b)(1) and (b)(2) was appropriate, whether the terms of the proposed settlement were fair, reasonable and adequate and whether the action should be dismissed "with prejudice against . . . all members of the class."

No member of the class objected to any aspect of the proposal. After consideration, I entered an Order and Final Judgment (a) approving the terms of the settlement as fair, reasonable and adequate; (b) dismissing the action, and dismissing and releasing any and all claims of plaintiffs and all members of the class which were or which could have been alleged in any of the complaints filed in this action, other than any claim for breach of the settlement, as to all defendants, on the merits and with prejudice; and (c) permanently barring and enjoining the institution or prosecution by any plaintiff or any member of the class, of any other action or proceeding asserting claims against any defendant which were so settled and dismissed or which arose out of the settlement.

In reaching this conclusion, I was motivated in part by the understanding that no Delaware case had yet held that, absent coercion, a controlling shareholder could not offer to buy stock from fellow shareholders at less than an "intrinsically fair" price and that the tender offer price represented a very substantial premium over the prior trading price of the ABC stock. I was also mindful that an investment banker had earlier refused to opine that a similar price was intrinsically fair; that application of comparable company ratios suggested that ABC represented a substantially higher value than either the market price of its stock or the value implied by the $75 per share price of the Drummond acquisition; and that plaintiffs could argue that the tender offer was coercive (in that the offering document suggested future dividend policy was undecided). In these circumstances, and considering other matters relating to the strengths and weaknesses of the claims and that no class members objected to the $5 per share proposed as settlement, I concluded the proposed settlement represented a fair compromise.

Six months later, on August 1, 1990, this Court, through Vice Chancellor Chandler, rendered a decision in the *Neal* appraisal action which found an appraised value of $180.67 per ABC share.[3] The settlement no longer seemed so appealing to former shareholders who did not seek judicial appraisal.

* * *

On January 8, 1991, Mr. John H. Martin, a former ABC shareholder, filed an action in the Circuit Court for Jefferson County, Alabama, at Birmingham, against the defendants in this action seeking a money judgment for alleged wrongs arising out of the two-step acquisition of ABC by Drummond. *Martin v. Drummond Co.*, Ala. Cir. Ct., No. 91-0143. Former shareholders representing some

[3] That decision was affirmed in the Delaware Supreme Court on March 8, 1991. *Alabama By-Products Corp. v. Neal*, Del. Supr., 588 A.2d 255 (Mar. 8, 1991).

400,000 ABC's shares are now party to that action or similar ones. No doubt in response to Mr. Martin's action, defendants moved in this court for an order providing for further notice to the class and a hearing designed to afford to class members an opportunity to seek reconsideration of the class certification question and an opportunity to present any evidence or argument they may wish to present to support any view that the final judgment entered in this course is marred by fraud. Such notice was provided by mail. At the date fixed, no member of the class, except those represented by class counsel, chose to appear, although counsel for Mr. Martin sent the court written statements.

II.

In certifying this action as a Rule 23(b)(1)(A) and (b)(2) class, this court determined that a right to opt-out of the litigation was not constitutionally required. On reconsideration I remain of that view. In my opinion, the device of a properly administered class action may be employed, without affording opt-out rights, to bind all absent shareholder/plaintiffs to a final judgment in an action seeking to vindicate rights attaching to corporate stock, whether those rights are sought to be protected by injunction or compensated by an award of money. To do so is fully in accord with traditional notions of fair play and substantial justice.

An analogy to trust law suggests this conclusion most readily. An action by shareholders against corporate directors for breach of duties owed either to the corporation or to stockholders as a class is both historically and functionally very similar to a judicial accounting by a trustee. Indeed, the fiduciary duty of corporate directors is a court created duty that historically springs from equity's experience with trusts and trustees. *See, e.g.*, Marsh, *Are Directors Trustees?*, 22 Bus. Law. 35 (Nov. 1966). As with trust beneficiaries, so with corporate shareholders, the law that creates the relationship affords

to them a right to hold fiduciaries accountable in equity (although the standards of accountability differ).

Insofar as the potential liability of fiduciaries to "beneficiaries" is concerned, a trust accounting and an action for breach of directors fiduciary duty are functionally quite similar as well. The *cestuis que trusts* and the stockholders may reside in a great many jurisdictions. In each case the "fiduciary owes a duty of loyalty and care to the fictive entity—to the trust, to the corporation, or to the class. An action seeking to prove a breach of that duty is inescapably a true class action. Relief whether it be by injunction, rescission *or* an award of money will be determined by reference to the effects of the fiduciary's wrong on the trust or on the corporation or all of its stockholders as a class. Remedy in such an action will not entail individual matters. The present case is an example. If the Drummond tender offer had been determined to constitute a violation of fiduciary duty by the directors or by the controlling shareholder, a number of remedies might have been available—rescission, payment of "damages" to raise the price paid to a "intrinsically fair" price, or constructive trust—but in each case the particularities of any holder would have no bearing on the appropriate remedy.

In trust law, the Supreme Court has recognized that efficient administration of the law and fairness to trustees requires that non-resident beneficiaries may be bound by an adjudication of the trustee's fidelity in a foreign jurisdiction that is the situs of the trust. *See Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306 (1950). Reasons of efficiency as well as fairness require this result. *See* 5A A. Scott & W. Fratcher, *The Law of Trusts* § 572, at 189 (4th ed. 1989). Binding non-resident *cestuis que trusts* to such an adjudication, even if they have done no voluntary act associating themselves with the forum jurisdiction, gives no offense to traditional conceptions of fairness, as *Mullane* holds.

The efficiency and fairness concerns that support the result in *Mullane* suggest a similar result where the fiduciaries are corporate directors and the non-resident beneficiaries are not *cestuis que trust* but holders of corporate stock. Technical differences are less significant than one might think. If it is thought important to the *Mullane* result that the trust has a "situs" (as a legal fiction) in the jurisdiction of its creation, then one should appreciate that the corporation is present in its domiciliary state in the same way. *See* 8 W. Fletcher, *Cyclopedia Corporations*, § 4025 (Perm. ed. 1982). The traditional rule (and still the rule by statute with respect to Delaware corporations)[4] is that stock has its legal situs in the domiciliary jurisdiction. *See* 11 W. Fletcher, *Cyclopedia Corporations*, § 5101 (Perm. ed. 1982).

* * *

The parallel between administration of a trust by the jurisdiction creating it and the governance of internal corporate affairs by the jurisdiction creating a corporation might be seen as well when one considers other matters of internal affairs that affect rights and duties of holders of stock.

The universal rule is that internal affairs of a corporation, including "defining the attributes of shares . . . and protecting shareholders," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 94 (1987), are governed by the law of the corporation's domicile. Traditionally this led courts of equity to decline to hear matters concerning the internal affairs of foreign corporations even though *in personam* power was present, *see* 17 W. Fletcher, *Cyclopedia Corporations*, § 8425, *et seq.* (1982), although this rule has been relaxed in modern times. *Id.*

In that light, consider whether fundamental fairness (as construed by the *International Shoe* line of cases) would now require that a non-resident stockholder remain un-

[4] *See* 8 *Del. C.* § 169 (1983).

affected by a domiciliary adjudication between the corporation and another shareholder of the same class that determined, for example, that shareholders do (or do not) have a right, in the circumstances, to compel the calling of an annual meeting under the statutory law of the corporate domicile, merely because the second shareholder has no connection with the corporate domiciliary state other than ownership of stock in the corporation.

Even though there has been some relaxation of the historical rule that precluded a court of equity from entertaining a suit concerning the internal affairs of a foreign corporation, I suggest that it would be radically inconsistent with our history to suppose that binding an absent shareholder to an actual adjudication in the corporate domicile of the corporate rights of holders of stock is in any sense unfair to that absent shareholder (assuming notice and opportunity to be heard has been afforded). That history has obvious significance when a court must employ a test looking to "traditional notions of fair play and substantial justice." *See Burnham v. Superior Court*, —— U.S. —— (May 29, 1990) (opinion of Scalia, J.).

Or consider that a Rule 23(b)(1) or (2) declaratory adjudication in the corporate domiciliary jurisdiction determines that a class of preferred stock has no right to vote under given circumstances. Can it be supposed that a court of a sister state would—or would be constitutionally free to—disregard that determination in a later action against the corporation by a holder of that preferred stock who was not a party to the first action? *See Hansberry v. Lee*, 311 U.S. 32 (1940).

One might seek to distinguish these examples from cases of this sort—involving alleged breaches by directors of fiduciary duties—on the ground that these examples involve only injunctive or declaratory relief and this case, at the time of its settlement, arguably involved only a potential payment of money (either compensating or rescissionary damages). Even if one accepts, arguendo,

that this case when settled presented no realistic prospect for any remedy other than an award of money, what constitutional difference could that circumstance make in terms of the considerations that *International Shoe* points us towards? In all events the question, in terms of personal jurisdiction, must be whether considering all of the circumstances it is fair to bind the non-resident class member to the jurisdictional power of the tribunal. The right to hold directors liable for breaches of loyalty here in issue is no different conceptually from the right to compel a meeting or to determine the right to vote stock. In all three examples the right being asserted is owed to all holders of stock as a class; no holder of stock individually has significance. It would be novel, not consistent with traditional notions of fair play and substantial justice, to in effect hold that the corporate rights of stock as a class (including the right to hold directors accountable) can only be conclusively determined in a jurisdiction in which all holders may be subject to service of process.[6] *Mullane* seems to point in a different direction.

* * *

Some further support for this view derives from a series of older cases dealing with the ability of a court of the corporate domiciliary state conclusively to determine the *obligations* of holders of stock in domestic corporations, without joining all holders. The cases arise from the historical fact that in earlier times some corporation statutes imposed limited liability on shareholders in the event of corporate insolvency. *See, e.g., Bernheimer v. Converse*, 206 U.S. 516 (1907); *Christopher v. Brusselback*, 302 U.S. 500 (1938). Imagine a case in which a corporate receiver petitions a court in the corporate domicile for an order adjudicating that an assessment against holders of stock is appropriate and fixing its amount. The receiver then takes her judgment to a foreign jurisdiction in which a shareholder who was not a party to the first

[6] Which, of course, means for public companies in no single jurisdiction at all.

action resides, and seeks to enforce it in the courts of that state. *E.g., Keehn v. Hodge Drive-It-Yourself, Inc.*, Ohio Supr., 64 N.E.2d 117 (1945). In such cases, the Supreme Court has repeatedly held that, even though the first judgment creates no *in personam* liability, it conclusively does establish the rights and obligations of corporate stock. What is left open is the question whether the defendant in the second action *is* a "shareholder" who is therefore liable. *See Selig v. Hamilton*, 234 U.S. 652, 661 (1914); *Great Western Telegraph Co. v. Purdy*, 162 U.S. 329, 336-37 (1896).

The facts of *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941) are representative. It was an action brought against a resident of the state of Georgia by the statutory liquidator of a New York mutual insurance company. Because he bought a life insurance policy the Georgia defendant was allegedly a "member" of the company. The liquidator had obtained an order from the Supreme Court of New York to the effect that each member of the mutual company should pay an assessment in specified amounts aggregating 40% of the premiums earned by the company during the year 1937. All "members" of the corporation were given written notice of the proceeding but none appeared to object to entry of the order.

The Supreme Court of Georgia refused to accord full faith and credit to the order of the New York court on the basis that the defendant had not been served with process and was not subject to *in personam* jurisdiction in New York. It relitigated the legal question whether, under New York law, a policy holder was a "member" of the mutual company who could be liable for assessments on insolvency. It held that the resident defendant was not a "member" of the corporation and thus not liable. The Supreme Court of the United States, through Chief Justice Stone, upheld this result but, in doing so, it recognized that only the limited question—whether the Georgia de-

fendant was a member of the corporation—was open for adjudication.

The following quotation begins with the recitation of a principle that has pertinence to the present inquiry:

> It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it. *Hawkins v. Glenn,* 131 U.S. 319; *Hancock National Bank v. Farnum,* 176 U.S. 640; *Bernheimer v. Converse,* 206 U.S. 516; *Converse v. Hamilton,* 224 U.S. 243, 260; *Selig v. Hamilton,* 234 U.S. 652; *Marin v. Augedahl,* 247 U.S. 142; *Broderick v. Rosner,* 294 U.S. 629; *Chandler v. Peketz,* 297 U.S. 609. Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulatory power of the state of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process, and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. *See Christopher v. Brusselback,* 302 U.S. 500, and cases cited. The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested. *Supreme Council of Royal Arcanum v. Green,* 237 U.S. 531; *Modern Woodmen v. Mixer,* 267 U.S. 544. The Supreme Court of Georgia found it unnecessary to consider the application of these authorities to the present case, since it decided that respondents, by acquiring the particular form of policy issued by the Indemnity Company, did not become members of it.
>
> It is evident that if the constitutional authority of the Indemnity Company to stand in judgment for its

> absent members turns on their consent or their assumption of membership in the Company, respondents, who were not parties to the New York proceedings, may defend on the ground that they never became members because they have done no act signifying such consent or assumption. After an assessment has been lawfully levied on the members of a corporation, it is still open to any who were not parties to the assessment proceeding to defend on the ground that they never became stockholders . . . . Ordinarily this means no more than that they have not acquired or owned stock in the corporation during the relevant period. For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach to stock ownership.
>
> * * *
>
> Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted application of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject.

Pink v. A.A.A. Highway Express, Inc., 314 U.S. at 207-08, 210-11.

Cases such as *Pink* recognize that obligations (and *a fortiori* rights) that "attach to stock ownership," 314 U.S. at 208, may be conclusively adjudicated (*see* n. 1 *supra*) in a judicial proceeding in the state of incorporation. While such proceedings necessarily will leave open the question whether any particular person, not a party to

the action, *is* a stockholder or not, (in this setting, is a member of the class or not) these cases establish that the Fourteenth Amendment does not require that every stockholder be a party in order that each be bound by a judicial determination of the existence or non-existence of rights that "attach to stock ownership." In this respect, these cases are consistent with *Mullane* and inconsistent with the assertion that an opportunity to opt-out of an adjudication of the corporate rights of holders of ABC stock was mandated by the Fourteenth Amendment in this instance.

* * *

The modern law of personal jurisdiction, of course, takes as it [*sic*] polestar the broad concept of fairness. To recognize that fact however, does not command a different result in corporate law than *Mullane* reached in trust law. Even if we are to consider the acts of plaintiff as the necessary first step, to our analysis, *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980), the concept of fairness to shareholder plaintiffs should not be pulled from its historical setting, *Burnham v. Superior Court, supra,* or considered apart from fairness to defendants and efficiency of adjudication in our federal system.

In my opinion, buying stock of a Delaware corporation (or a New York corporation, etc.) is itself a sufficient act to establish a nexus with the jurisdiction that creates and regulates the internal governance of that corporation to render it consistent with traditional notions of fairness to bind the holder of that stock as a plaintiff to adjudications *concerning the corporate rights that attach to that stock,* including the equitable right to require directors to act with loyalty to the corporation and its shareholders. I say this recognizing that, in many instances, people will in fact buy stock without any understanding of which state has created that corporation and governs its internal affairs. But it is not unreasonable—not inconsistent with traditional notions of fairness, in my opinion—to con-

clude that the law has long put the buyer of corporate stock on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in another jurisdiction, including at a minimum the corporation's state of incorporation. *See Shaffer v. Heitner,* 433 U.S. 186 (1977) (Brennan, J., concurring in part and dissenting in part). To hold otherwise is to hold that traditional notions of fairness to plaintiffs requires that corporate directors' [*sic*] cannot be afforded a single adjudication in which the question of their legal and equitable obligations to an aggregate class can be determined. The magnificent generalities of the Fourteenth Amendment should not, I suppose, actually require a result that is both wasteful and unfair. This reasoning applies equally to actions seeking injunctions and to actions seeking an award of money. *Compare In the Matter of Colt Indus. Shareholders' Litig.*, 77 N.Y.2d 185 (1991).

Thus, considering the language of Rule 23 and the requirements of the United States Constitution I conclude that this action was properly certified as a class action under Rule 23(b)(1)(A) and (b)(2). *See Nottingham Partners v. Dana,* Del. Supr., 564 A.2d 1089 (1989). It is unlike *Raskin v. Birmingham Steel Corporation,* Del. Ch., C.A. No. 11365, Allen C. (Dec. 4, 1990) in which the class-based breach of fiduciary duty claim was insubstantial and the real claim was a market-based "fraud" claim which had important individual (not class-based) aspects (*i.e.*, damages).

III.

Defendants seek an adjudication of the question whether there was fraud in the conduct of this litigation that would justify this court in setting the final judgment aside. The mechanism for the review sought is Rule 60(b). Defendants seek what is, in effect, a declaratory adjudication since they themselves assert that there was no fraud or other misconduct that would justify setting the final judgment aside. Notice of this application was

duly made by mail to all class members, in a form approved by the court. Since no member of the class appeared to be heard on the application, it raises again and in a slightly different context the question whether stockholders can constitutionally be subjected to this court's processes for the purpose of determining rights against corporate directors arising from ownership of corporate stock. As I have already addressed that subject, I pass over it here, finding nothing in the context of a 60(b) motion that would justify a different conclusion.

The issue that defendants tender is quite simple. The record in the *Neal* appraisal action in this court was placed under seal by consent of the parties.[6] That case was tried in June and July 1989. The trial was open to the public and the trial record was open to the public thereafter. This case was settled by agreement made in June 1989 and formally entered into in a November 1989 Agreement. After notice, a hearing on the fairness of the proposed settlement was held on February 1, 1990. Final judgment was entered on that date. On August 1, 1990 decision in the *Neal* case was issued.

The assertion by certain class members in a lawsuit filed after the decision in the appraisal case is that they were deceived by the defendant in the appraisal case (ABC itself is the only statutory defendant in an appraisal action) since that defendant secured an order sealing portions of the discovery file in that matter.

This assertion appears to reflect the regrettable excesses to which lawyer misconceptions of the obligation of zealous advocacy can lead. First, and most importantly, the trial record upon which Vice Chancellor Chandler reached his August 1, 1990 decision was fully available to the public at the time of the notice and at the time of the hearing on the fairness of the proposal. Second, even

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[6] The court has since modified its Rule 5 to require a judicial finding of good cause in order to put files under seal.

as to matters that were in the court's file but not in the trial record, no application was ever made for access at any time. Any such application by a stockholder would unquestionably have been granted. Third, some members of the appraisal class (such as Mr. Neal himself) were also members of this class action (they tendered some shares and dissented with respect to other shares). They plainly had access to all files at all times. Yet no shareholder objected to the proposed settlement.

Since I conclude that this case was properly certified as a class action under Rule 23(b)(1)(A) and (b)(2), I conclude that former shareholders of ABC are subject to the court's processes to the limited extent necessary to adjudicate their rights as stockholders against the corporation's directors and controlling shareholder. Further, concluding that the members of the class have been afforded reasonable notice and an opportunity to be heard on the questions raised by defendants' Rule 60(b) motion and, finally, concluding that there is no basis in fact to hold either (1) that defendants were guilty of fraud or other wrong in attempting to maintain confidentiality of certain financial information during the discovery phase of the appraisal proceeding or (2) that material information relating to the strength and weaknesses of the claims asserted, the value of ABC or its stock or the fairness of the settlement proposal, was unavailable to members of the class at the time they elected not to oppose the settlement that had been proposed, I reach the opinion that no fraud or other wrong to the class was occasioned by the handling of court records in this matter or in the *Neal* case.

Defendants may, on notice to counsel, submit a form of order consistent with the foregoing.

APPENDIX B

Order Entered on Chancellor Allen's June 14, 1991, Opinion

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 7904

RICHARD HYNSON, JR., *et al.*,
Plaintiffs,

v.

DRUMMOND COAL COMPANY, INC., *et al.*,
Defendants.

ORDER

WHEREAS, this action was commenced as an asserted class action by Complaint filed January 4, 1985, which Complaint was amended by an Amended Complaint filed on February 21, 1985, and a Second Amended and Supplemental Complaint filed on September 11, 1986; and a motion for class certification under Chancery Rule 23(b)(2) was filed on January 21, 1987; and

WHEREAS, this action, brought by plaintiffs who were holders on December 5, 1984, of common stock (Class A and Class B) of Alabama By-Products Corporation, a Delaware corporation ("ABC"), against the controlling stockholder of ABC, Drummond Coal Company, Inc. ("Drummond"), and its subsidiary, and against the directors of ABC, challenged a tender offer by Drummond to

acquire the outstanding stock of ABC not then owned by it, and, thereafter, a subsequent merger of ABC into a Drummond subsidiary; and

WHEREAS, following discovery and motion practice, settlement negotiations took place in this action and resulted in the submission to this Court on November 3, 1989, of a Stipulation and Agreement of Compromise and Settlement (the "Stipulation") dated that date; and

WHEREAS, the Stipulation contemplated, and this Court ordered on November 28, 1989, pursuant to Chancery Rules 23(a), 23(b)(1) and 23(b)(2), that this action was to be settled as a class action, the class to consist of the class defined in the Stipulation; and notice of the proposed settlement was duly mailed to all members of the class on or about November 29, 1989, informing them of the terms of the proposed settlement and of their right to appear at a hearing, to be held on February 1, 1990, and to object to certification of the class or to the terms of the settlement; and

WHEREAS, on February 1, 1990, that hearing was held to determine whether the maintenance of this action as a class action under Chancery Rules 23(a), 23(b)(1) and (b)(2) was appropriate, whether the terms of the proposed settlement were fair, reasonable and adequate and whether the action should be dismissed "with prejudice against . . . all members of the class"; and

WHEREAS, neither at the February 1, 1990, hearing, nor otherwise did any member of the class object to any aspect of the proposed settlement, and after consideration, the Court on February 1, 1990, entered an Order and Final Judgment (the "Final Judgment") (a) approving the terms of the Stipulation, including the class certification and the substantive terms of settlement, as fair, reasonable and adequate; (b) dismissing the action, and dismissing and releasing any and all claims of plaintiffs

and all members of the class which were or which could have been alleged in any of the complaints filed in this action, other than any claim for breach of the settlement, as to all defendants, on the merits and with prejudice; and (c) permanently barring and enjoining the institution or prosecution by any plaintiff or any member of the class, of any other action or proceeding asserting claims against any defendant which were so settled and dismissed or which arose out of the settlement; and

WHEREAS, on or about January 8, 1991, Mr. John H. Martin, a member of the class, filed an action in the Circuit Court for Jefferson County, Alabama, at Birmingham, against most of the defendants in this action seeking a money judgment for alleged wrongs arising out of the matters which were the subject of this action and which were settled and released by the Final Judgment of February 1, 1990, in this action (*Martin* v. *Drummond Co.*, Ala. Cir. Ct. (Jefferson County), No. 91-0143); and it appears to this Court that approximately 400 other class members have now joined in such action or have filed similar actions, or both, in the Circuit Court for Jefferson County, Alabama; and

WHEREAS, in the Alabama actions, the plaintiffs alleged that this Court's Final Judgment of February 1, 1990, was procured by fraud and that the class was not properly certified under Chancery Rules 23(b)(1) or (b)(2) and that this Court's Final Judgment was not, or could not be, binding upon them consistently with the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and

WHEREAS, on April 11, 1991, those of the defendants in this action who were defendants in the Alabama action filed a "Motion for Hearing" in this action, seeking that this Court hold a hearing at which any member of the class or their attorneys might address to this Court any question or issue touching upon any alleged invalidity of the Final Judgment; and

WHEREAS, a hearing was held upon such "Motion for Hearing" on April 24, 1991, and at such hearing, the Court indicated that it would grant the motion, and by Order of April 25, 1991, the Court set a hearing to be held on June 7, 1991, at 2:00 p.m. in the Court of Chancery, Wilmington, Delaware, at which any member of the class or their attorneys might address to this Court any questions as to whether the Final Order and Judgment was invalid generally or with respect to any of the class members because of fraud, or by reason of this action being designated as a class action pursuant to Chancery Rule 23(b)(1) and (b)(2) with no formal right to opt out of the class, or by reason of lack of due process, or otherwise; and

WHEREAS, notice of such hearing was duly given on or before May 3, 1991, by first-class mail, to all members of the class; and

WHEREAS, on June 7, 1991, such hearing was duly held in the Court of Chancery, Wilmington, Delaware, before the undersigned Chancellor, and written statements submitted by James L. North, Esq., of Birmingham, Alabama, on behalf of Mr. John H. Martin and the other plaintiffs in the Alabama actions represented by Mr. North, and by Hobart A. McWhorter, Jr., Esq. and others, of the law firm of Bradley, Arant, Rose and White, of Birmingham, Alabama, on behalf of Arthur B. Durkee, Jr., and Alberta G. Reed and the other plaintiffs in the Alabama actions represented by that firm, were duly considered by the Court, although no appearances by such counsel were filed; and

WHEREAS, at such hearing the defendants who had applied for the hearing appeared through counsel, having filed a brief, and presented oral argument, and counsel for the plaintiff class having also presented oral argument; and

WHEREAS, no other party made any other appearance at such hearing or filed any written statement prior thereto with respect to the matters to be considered at the hearing;

NOW, THEREFORE, the Court having considered the matter, and being fully advised in the premises, it is this 24th day of June, 1991, for reasons more fully set forth in this Court's Opinion dated June 14, 1991, hereby ORDERED AND ADJUDGED as follows:

1. This Court has personal jurisdiction over the class members referred to in the Court's Final Judgment dated February 1, 1990, and in the Stipulation dated November 3, 1989, and had such jurisdiction as of February 1, 1990, to the extent necessary to make and enter the Final Order and Judgment dated February 1, 1990, and to make and enter this Order, and the former shareholders of ABC are subject to the processes of this Court to the extent necessary to adjudicate their rights as stockholders against ABC's directors and controlling stockholder. The moving defendants are subject to the personal jurisdiction of this Court and by making the Motion for hearing fully submitted themselves to this Court's judgment upon it.

2. This case was properly certified as a class action under Chancery Rules 23(b)(1)(A) and (b)(2), without the "opt-out" right specified in Chancery Rule 23(c)(2)(A).

3. Such certification, and the exercise of the Court's jurisdiction over the class members to bind them to the Final Judgment dated February 1, 1990, are consistent with the Due Process Clause of the Federal Constitution.

4. The members of the class previously certified in this action have been afforded reasonable notice and an opportunity to be heard on the questions raised by the moving defendants' Motion for Hearing as to whether the Final Judgment dated February 1, 1990, was procured by fraud or other wrong by the defendants.

5. There is no basis in fact to hold either (1) that defendants were guilty of fraud or other wrong in attempting to maintain confidentiality of certain financial information during the discovery phase of the appraisal proceeding in *Neal* v. *Alabama By-Products Corporation*, Civil Action No. 8282, in this Court or (2) that material information relating to the strength and weaknesses of the claims asserted in the *Neal* action or this action, the value of ABC or its stock or the fairness of the settlement proposal in this action, was unavailable to members of the class at the time they elected not to oppose the settlement that had been proposed, and the Court declares and finds that no fraud or other wrong to the class was occasioned by the handling of court records in this action or in the *Neal* action, and in particular the Court finds that the entire trial record in the *Neal* case was open and available to the public from and after the time of the trial in June and July 1989, and the post-trial briefs of counsel were open and available to the public from and after the times of their filing in the period August to October 1989.

6. The Court, having found the Final Judgment dated February 1, 1990, to be consistent with the Due Process Clause of the Federal Constitution for the reasons stated in this Court's Memorandum Opinion dated June 14, 1991, finds no reason to reach, or pass judgment on, the various other alternative arguments made by the moving defendants in support of their contentions that the Final Judgment is consistent with the Due Process Clause with respect to all of the class members, or with respect to those class members who have submitted W-9 Forms, or with respect to others of the class members.

/s/ William T. Allen
Chancellor

6-24-91

APPENDIX C

Notice of May 2, 1991, as to June 7, 1991, Hearing in *Hynson*

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 7904

RICHARD HYNSON, JR. AND JEFFREY H. WACHTEL,
Plaintiffs,

v.

DRUMMOND COAL COMPANY, INC., DRUMMOND COAL SALES, INC., CHARLES W. ADAIR, ELBERT A. DRUMMOND, GARRY N. DRUMMOND, JOSEPH E. NICHOLLS, JR., G. A. PRIBBENOW, JR., R. WEAVER SELF, HALL THOMPSON and CHARLES E. TWEEDY, JR.,
Defendants.

NOTICE OF HEARING ON THE VALIDITY
OF THE ORDER AND FINAL JUDGMENT
AND RIGHT TO APPEAR

NOTICE TO ALL CLASS MEMBERS

This notice is given pursuant to the Order dated April 25th, 1991 of the Court of Chancery of the State of Delaware in and for New Castle County to all former stockholders of Alabama By-Products Corporation ("ABC") (i) who tendered their ABC shares in response to the tender offer of Drummond Coal Company, Inc.,

("Drummond") and Drummond Coal Sales, Inc. ("DCS") made on December 5, 1984, to purchase for $75 per share any and all outstanding shares of Class A or Class B ABC common stock ("the Tender Offer"), (ii) who held ABC shares on December 5, 1984 and sold those shares prior to August 13, 1985 and/or (iii) whose ABC shares were converted by the merger of ABC into a subsidiary of Drummond and DCS on August 13, 1985 into the right to receive $75.60 per share in cash, with the exception of (i) the named defendants, their immediate families and/or entities controlled by the defendants, and (ii) persons who were entitled to an appraisal of their ABC stock by the Delaware Court of Chancery ("the Court") in Civil Action No. 8282 or who settled their appraisal claim. This notice will refer to the group of former ABC stockholders defined above as "the Class."

The members of the Class are hereby notified that a hearing will be held before the Court in the Public Building, Eleventh and King Streets, Wilmington, Delaware 19801, on June 7, 1991 at 2:00 p.m. ("the Hearing") at which any member of the Class or their attorneys may appear and address to the Court orally or in writing any questions as to whether the Order and Final Judgment ("Final Judgment") entered by this Court in this action on February 1, 1990 is invalid generally or with respect to any of the Class members, because of fraud or by reason of this action being designated as a class action pursuant to Rule 23(b)(1) and (2) with no right to opt out of the Class, or lack of due process or otherwise. Members of the Class or their attorneys who wish to have their position considered by the Court, should provide a writing stating in summary terms their position to the Court addressed to the Register in Chancery, Public Building, 11th and King Streets, Wilmington, Delaware 19801 with copies provided of any such writing to Richard L. Sutton, Morris, Nichols, Arsht & Tunnel, 1201 N. Market Street, P.O. Box 1347, Wilmington, DE 19899; Norman M. Monhait, Morris, Rosenthal, Monhait & Gross, P.A.,

First Federal Plaza, P.O. Box 1070, Wilmington, DE 19899, and James L. North, 700 Title Building, 300 21st Street North, Birmingham, Alabama 35203 by no later than June 1st, 1991.

Attached hereto as Exhibit I, which you are urged to read, is a Motion For A Hearing on the Order and Final Judgment entered herein On February 1, 1990 ("the Motion") which sets forth the reasons why defendants asked that the Hearing be held. In particular, allegations have been made by at least one Class member, John M. Martin, in an action filed by him in the Circuit Court for Jefferson County, Alabama that the Judgment is invalid due to fraud or by reason of the certification of the action as a class action under Rules 23(b)(1) and (2) with no formal right to opt out of the class. These allegations are more fully referred to in Exhibit I at paragraph 13 and set forth in Exhibit A to Exhibit I.

Upon the hearing, the Court may enter such order concerning the subject matter of the defendants' Motion as is appropriate and as justice and equity may require.

Register in Chancery for the
Court of Chancery
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in and for New Castle County

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN H. MARTIN, *et al.*,
Petitioners,

vs.

DRUMMOND COMPANY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The Petition for Writ of Certiorari is due to be granted. The respondents have joined issue on the question presented, *viz.*, whether a state court class action judgment wholly or predominately for money damages may bar the individual claims of absent class members who had minimum contacts with the forum state but who were not provided with an opportunity to "opt out" of the class as required by due process. The reasons offered by respondents for denial of the petition are without merit. This case presents a question of importance on which the lower courts are in irreconcilable conflict. In addition, this case provides an appropriate vehicle with which to resolve this question.

I. There is a conflict among the lower courts that requires resolution by this Court.

The Alabama Supreme Court's decision in this case stands in square conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (CA9 1992), *cert. granted,*, 114 S.Ct. 56 (1993), *cert. dismissed per curiam*, 114 S.Ct. 1359 (1994). In the proceedings below, the Alabama Supreme Court held that an absent class plaintiff can be bound by a class judgment for money damages even if he were not afforded a right to opt out of the class, so long as the absent class plaintiff possessed minimum contacts with the forum state. That conclusion, which is inconsistent with the requirements of procedural due process as defined by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), is directly contrary to the one reached by the Ninth Circuit in *Ticor*. The *Ticor* court held that "minimal due process requires that 'an absent class plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court,' if monetary claims are involved." 982 F.2d at 392 (quoting *Shutts*, 472 U.S. at 812). The Ninth Circuit in no way qualified its holding to apply only when the absent class plaintiff lacks minimum contacts. Instead, the Ninth Circuit applied the plain language of *Shutts*, which requires that an opt-out right be provided to all absent class plaintiffs who have claims predominately for money judgments. Contrary to the suggestions of respondents, the conflict between the Alabama Supreme Court and the Ninth Circuit is real.

The confusion that exists among the state and federal courts concerning the meaning of *Shutts* is quite evident. In its decision below, the Alabama Supreme Court confessed that it was unclear as to the meaning of *Shutts*. The Alabama court stated:

> We are not sure how far *Shutts* . . .reach[es] in this situation; indeed, the United States Supreme Court, as we read *Ticor* [*Title Insurance Co. v. Brown*,, 511 U.S. ___, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994)], seems unsure of the reach of *Shutts*.

(Pet. for Cert., at 44a-45a) (footnote omitted). When a lower court is in such a state of uncertainty over the meaning of a precedent of this Court, there is a compelling need for resolution of the uncertainty. The fact that this Court initially granted the petition for certiorari in *Ticor* suggests that this Court recognized the conflict that exists over this question among the lower courts. As made clear in the Petition for Writ of Certiorari in this case, the problems that prevented this Court from deciding the question in *Ticor* are absent here. Thus, this case presents an ideal vehicle for the Court to resolve this troubling question that continues to plague the lower courts.

II. Respondents seek to undermine the Constitution's procedural due process protections.

This Court's decision in *Shutts* makes plain that an absent class plaintiff *must* be provided with an opportunity to opt out of the class in order for the judgment to be binding on that absent class member. The *Shutts* Court stated: "In addition, we hold that due process requires at a minimum that an absent class member be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812. Respondents in their brief never come to grips with that holding. Instead, they seek to divert the Court's attention through the use of gimmicks, such as counting the number of times the word "jurisdiction" is

used in the *Shutts* opinion.[1] The respondents, however, do not and cannot provide an explanation as to why the clear language of *Shutts* should be ignored..

Respondents' arguments concerning an alleged waiver by the petitioners of their procedural due process rights would render meaningless the constitutional protections of *Shutts*. Respondents suggest that petitioners have waived their rights because, after receiving two first-class mail notices of hearings in Delaware concerning the class judgment, petitioners did not appear at the hearings to challenge the class judgment or request that the Delaware court exercise its discretionary power under state law to provide opt-out rights. This argument, if accepted, would stand *Shutts* on its head. The requirement of opt-out rights mandated by *Shutts* is designed to prevent the need for an absent class plaintiff to appear at any court hearing or to be forced to request an opt-out. The *Shutts* Court contemplated a simple form that could be filled out by the absent class plaintiff if he wanted to be excluded. Under the respondents' circular reasoning, the mandatory duty to provide absent class plaintiffs an opportunity to opt out would be discharged if the absent class plaintiffs are merely told when a hearing would take place on the class judgment. Such an argument cannot be taken seriously.[2]

---

[1] Drummond also alludes in a footnote to an alleged statute of limitations problem in the Alabama courts. (Resp. Brf. p. 14, n. 8). Pretermitting the fact that the Alabama Supreme Court noted no such problem, the statute of limitations was clearly tolled during the pendency of *Hynson*. In a trilogy of cases, this Court embraced the principle that the filing of a class action tolls the applicable statute of limitations for *all* class members. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554-55 (1974).

[2] The additional claim by respondents that petitioners actually appeared in the *Hynson* case by allegedly filing briefs is belied by the fact that the Delaware chancellor held that petitioners made no appearance in his court. (Resp. Brf. p 26a).

There is also no basis for respondents' claim that petitioners are barred from collaterally attacking the class judgment in *Hynson*. Since this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), collateral attacks have been considered an integral part of the class action process. The *Hansberry* Court held that, if the res judicata effect of a prior judgment is collaterally attacked on due process grounds, it is the duty of the reviewing court to examine the prior litigation to determine if the complainant was afforded due process. 311 U.S. at 40. Although petitioners have conceded that they had minimum contacts with Delaware, that is not the end of the constitutional inquiry. If respondents had provided petitioners with an opportunity to opt out in *Hynson*, there could be no collateral attack. But, no such opportunity was provided. Accordingly, respondents must live with the consequences of the constitutional deficiencies of the proceedings in *Hynson*.

Finally, the argument that the petitioners cannot collaterally attack the *Hynson* judgment appears to have been put to rest by this Court in its opinion dismissing certiorari in the *Ticor* case. Both the per curiam majority and the dissent made it clear that the constitutional issue could be raised on collateral attack, as it had been in the Ninth Circuit. At least implicit in the *Ticor* opinions is the recognition that a constitutional challenge on due process grounds may be brought collaterally.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, this Court should grant the petition to review the important question presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. North, a member of the Bar of this Court, hereby certify that on this 8th day of November, 1995, three copies of the Reply Brief of Petitioners in the above-entitled case were mailed, first class postage prepaid, to the following:

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